Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-436 and 75-437

JAMES L. BUCKLEY, *et al.*,

Appellants,

v.

FRANCIS R. VALEO, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE APPELLANTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Nos. 75-436 and 75-437

JAMES L. BUCKLEY, *et al.*,

Appellants,

v.

FRANCIS R. VALEO, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE APPELLANTS

JUDGMENT, DECISION, AND OPINIONS BELOW

The majority, concurring, and dissenting opinions and order of the Court of Appeals rendered August 15, 1975, are not yet officially reported. They are printed as Appendix A to appellants' Jurisdictional Statement filed in the appeal from the Court of Appeals' decision.

The judgment of the District Court entered August 15, 1975, is not yet officially reported. It is printed as Appendix A to appellants' Jurisdictional Statement filed in the appeal from the District Court's judgment.

JURISDICTION

The Court of Appeals had jurisdiction of the constitutional questions certified to it pursuant to 2 U.S.C. § 437h(a). Jurisdiction of the appeal from the decision rendered by the Court of Appeals is conferred on this Court by 2 U.S.C. § 437h(b), which provides:

> "Notwithstanding any other provision of law, any decision on a matter certified under subsection (a) shall be reviewable by appeal directly to the Supreme Court of the United States."

Section 437h(c) provides:

> "It shall be the duty of the court of appeals and of the Supreme Court of the United States to advance on the docket and to expedite to the greatest possible extent the disposition of any matter certified under subsection (a)."

The United States District Court for the District of Columbia had jurisdiction over the constitutional challenge to Subtitle H by virtue of 26 U.S.C. § 9011(b) and 28 U.S.C. §§ 2282, 2284. This Court has jurisdiction over the appeal from its judgment by virtue of 28 U.S.C. §§ 1253, 2101.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions involved in this appeal are:

Article I, Section 4:

> The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of Chusing Senators."

Article I, Section 8, clause 1:

> "The Congress shall have Power To . . . provide for the . . .general Welfare of the United States . . . ."

Article II, Section 2, clause 2:

> " . . . He [the President] . . . shall nominate, and by and with the Advice and Consent of the Senate shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments."

Amendment I:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment IV:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Amendment V:

"No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ."

Amendment IX:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The statutes involved in this appeal are the Federal Election Campaign Act of 1971, Public Law 92-255, 2 U.S.C. §§ 431 *et seq.*, as amended by the Federal Election Campaign Act Amendments of 1974, Public Law 93-443, including amendments to the criminal code (all referred to herein as FECA); and Subtitle H of the Internal Revenue Code of 1954, Public Law 92-178, 26 U.S.C. §§ 9001 *et seq.*, as amended by Public Law 93-53, 87 Stat. 139, and as further amended by the Federal Election Campaign Act Amendments of 1974.

The particular provisions of these statutes whose constitutionality is at issue are those listed in the certified constitutional questions, set out at pp. 1582-86 of Appendix A to the Jurisdictional Statement filed in the appeal from the decision of the Court of Appeals. The text of the statutes is contained in Volume III of the Appendix to the briefs herein.

QUESTIONS PRESENTED

1. Did the Court of Appeals correctly conclude that the limitations imposed by FECA on expenditures by political candidates and organizations are constitutional?

2. Did the Court of Appeals correctly conclude that the limitation imposed by FECA on expenditures by any person relative to a clearly identified candidate are constitutional?

3. Did the Court of Appeals correctly conclude that the limitations imposed by FECA on contributions to political candidates and organizations are constitutional?

4. Did the Court of Appeals correctly conclude that the disclosure requirements imposed on political candidates, organizations and individuals by FECA are constitutional?

5. Did the courts below correctly conclude that the public financing provisions of FECA and Subtitle H of the Internal Revenue Code are constitutional?

6. Did the Court of Appeals correctly conclude that the method provided by FECA for appointing members of the Federal Election Commission is constitutional?

7. Did the Court of Appeals properly decline to decide whether certain powers conferred upon the Federal Election Commission by FECA are constitutional?

8. Are the powers conferred upon the Federal Election Commission by FECA constitutional?

A more detailed statement of the questions presented, as certified from the District Court to the Court of Appeals, is found at pp. 1582-86 of Appendix A to the Jurisdictional Statement filed in the appeal from the decision of the Court of Appeals.

STATEMENT OF THE CASE

A. *History of the Proceedings*[1]

This action was filed by appellants on January 2, 1975, the first day after the effective date of the Federal Election Campaign Act Amendments of 1974. The First Amended Complaint (App. I-36-73)[2] seeks declaratory and injunctive relief against certain provisions of the Federal Election Campaign Act of 1971, P.L. 92-225, 86 Stat. 3, 2 U.S.C. §§ 431 *et seq.* (hereinafter, as amended, the FECA), the Federal Election Campaign Act Amendments of 1974. P.L. 93-443, 88 Stat. 1263 (hereinafter the FECA Amendments), and Subtitle H of the Internal Revenue Code of 1954, P.L. 92-178, 85 Stat. 562, as amended by P.L. 93-53, 87 Stat. 138, 26 U.S.C. §§ 9001 *et seq.*, and by the FECA Amendments (hereinafter Subtitle H). Appellants requested convocation of a three-judge court under 28 U.S.C. §§ 2282 and 2284 and certification to the Court of Appeals under 2 U.S.C. § 437h.

On January 24, 1975, District Judge Corcoran denied appellants' request for a three-judge court and certified the action to the Court of Appeals, stating:

> "The Court specifically finds that the plaintiffs raise substantial constitutional questions . . . ."

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[1] A fuller history of the proceedings is found in Appendix B to the Court of Appeals' opinion (op. at 1586-89).

[2] The Appendix is being filed in three volumes. Volume I (cited as App. I-) contains pleadings and other materials designed by the parties. Volume II (cited as App. II-) contains the District Court's Recertification Decision of May 19, 1975, consisting mostly of findings of fact. Volume III (cited by statutory section) contains the relevant statutes. In addition, for the convenience of the Court, appellants are lodging ten copies of the District Court's Recertification Decision, the same material covered by Volume II of the Appendix.

Buckley v. *Valeo*, 387 F. Supp. 135, 142 (D.D.C. 1975) (App. I-34).

On February 10, 1975, appellees moved to remand the case to the District Court and made suggestions for further proceedings, involving principally the severing of constitutional issues relating to Subtitle H from appellants' other constitutional challenges.

The Court of Appeals instituted fact-finding procedures on March 14, 1975, and on April 14 granted appellees' Motion for Remand (App. I-78-85). The District Court was instructed to frame the constitutional issues in the case, to engage in fact-finding procedures where necessary, and to return the record to the Court of Appeals by May 19, 1975. Subsequently, a three-judge District Court was convened (App. I-86-87); both that court and the Court of Appeals were to decide Subtitle H issues in order to ensure jurisdiction on appeal in this Court. Extensive discovery was had in the District Court.

Judge Corcoran issued his findings of fact, App. Vol. II, on May 19, 1975, and returned the record to the Court of Appeals. The District Court also certified the constitutional questions raised by the First Amended Complaint (App. II-754-60).

Oral argument was heard simultaneously by the Court of Appeals and the three-judge court on June 13. The decision and judgment below were issued on August 15, with the three-judge court adopting those portions of the Court of Appeals' decision pertaining to Subtitle H. These appeals followed.

B. *The Challenged Statutes*

(1) *Limits on Campaign Expenditures*

Candidates for nomination for the Presidency may not spend in excess of $10 million in pursuit of that nomination. The total spent in any one state may not exceed twice the expenditure limit applicable in that state to a candidate for nomination for election to the Senate. *Id.*, § 608(c) (1) (A). The Federal Election Commission (FEC) is to prescribe rules under which expenditures by candidates for nomination for the Presidency in two or more states are allocated for purposes of this provision. *Id.*, § 608(c) (4). No general-election candidate for President may spend in excess of $20 million. *Id.*, § 608(c) (1) (B).

Candidates for nomination for election to the Senate may not make expenditures in excess of 8 cents multiplied by the state's voting-age population or $100,000, whichever is greater. *Id.*, § 608(c) (1) (C). No general-election candidate for the Senate may spend in excess of 12 cents multiplied by the state's voting-age population or $150,000, whichever is greater. *Id.*, § 608(c) (1) (D).

In states with only one member in the House of Representatives, the Senate spending limits apply. *Id.*, §608(c) (1) (C)-(D). In all other House elections, no candidate may spend in excess of $70,000 in pursuit of the nomination or in excess of $70,000 in the general election. *Id.*, § 608(c) (1) (E).

Candidates may spend an additional 20 percent of the applicable spending limits for purposes of fund raising. *Id.*, § 591(f) (4) (H).

Expenditure is defined as "a purchase, payment distribution, loan, advance, deposit, or gift of money or anything of value . . . made for the purpose of influencing

the nomination for election, or election . . . ," but certain enumerated items are excepted, *id.*, § 591(f).

Section 9008 of the Internal Revenue Code of 1954 (hereafter I.R.C.) limits to $2 million the expenditures of party national committees with respect to each presidential nominating convention. The FEC may authorize an exception to this limit if it determines that "due to extraordinary and unforeseen circumstances" greater expenditures "are necessary to assure the effective operation" of such conventions, I.R.C. § 9008(d) (3).

The national committee and state committees of a political party may make expenditures in general election campaigns for federal office. National committee expenditures are limited to 2 cents multiplied by the voting-age population of the United States in the general election for President, *id.*, § 608(f) (2). A national or state committee may also spend up to 2 cents multiplied by the voting-age population of the state or $20,000, whichever is greater, in an election to the office of Senator or at-large Representative. Such committees may also spend up to $10,000 in an election to the office of Representative, *id.*, § 608(f) (3).

Limitations on expenditures are enforced by criminal sanctions. 18 U.S.C. § 608(i); I.R.C. § 9012.

All limits on expenditures are adjusted to changes in the Consumer Price Index. 18 U.S.C. § 608(d); I.R.C. § 9008(b) (5).

(2) *Limits on Independent Expenditures*

Section 608(e), 18 U.S.C., prohibits expenditures in excess of $1,000 during a calendar year by any person (defined by *id*, §591(g) to include individuals, committees and groups), "relative to a clearly identified candidate" and "advocating the election or defeat of such candidate."

(3) *Limits on Contributions*

No person, as defined by 18 U.S.C. § 591(g), may contribute in excess of $1,000 to any candidate for federal office. *Id.*, § 608(b) (1). Political committees which have been registered for six months, have received contributions from more than fifty persons and have contributed to five or more candidates for federal office may make contributions to individual candidates for federal office up to $5,000 each. *Id.*, § 608(b) (3).

Candidates may not spend personal funds or the funds of their immediate families in excess of $50,000 in the case of a candidate for President, $35,000 in the case of a candidate for the Senate, and $25,000 in the case of a candidate for the House. *Id.*, § 608(a).

Contribution is defined as "a gift, subscription, loan, advance, or deposit of money or anything of value . . . made for the purpose of influencing the nomination for election, or election . . . ." All bank loans made "in the ordinary course of business" are considered a loan by each endorser or guarantor in proportion to his total commitment to the entire loan. *Id.*, § 591(e). Exceptions to the definition of *contribution* are enumerated in *id.*, § 591(e) (5).

Certain incidental out-of-pocket expenses incurred by volunteers in excess of $500 constitute a contribution. *Id.*, § 591(e) (5).

Limits on contributions are enforced by criminal penalties, *id.*, § 608(i). These limits, unlike the limits on expenditures, are *not* adjusted to changes in the Consumer Price Index.

(4) *Federal Subsidies in Presidential Elections*

Section 9006, I.R.C., establishes a Presidential Election Campaign Fund composed of moneys transferred to that Fund by the Secretary of the Treasury not in excess of

the sum of amounts designated by individuals under the tax checkoff provided in Section 6096. Individual and joint taxpayers may designate $1 and $2, respectively, to be transferred to the Fund. Individuals may not designate either their party or their candidate preferences.

The first priority for the distribution of federal funds is the subsidization of the nominating conventions. Amounts remaining are used to provide financial support to candidates in the general election. Any amounts which are available and are not expended for these priority purposes are distributed to candidates for the presidential nomination of a political party. §§ 9037(a), 9008(a). The Secretary of the Treasury estimates the amount of money to be kept aside for the general election. § 9006(d). Once money is put aside for the nominating conventions and the general election, distribution is made to eligible primary candidates. The Secretary must make an "equitable distribution" among candidates for nomination of the same party, taking into account the sequence in which candidates become eligible. § 9037(b).

Section 9008(b) provides $2 million for major-party nominating conventions and an amount to minor parties (those receiving between 5 and 25 percent of the popular vote in the preceding election, § 9002(7)), proportionate to the popular vote they received in that election.

In the general election, the subsidy is divided evenly between major-party candidates, each receiving $20 million, if available. § 9004(a) (1). Minor-party candidates receive amounts proportionate to the popular vote they received in the preceding election. § 9004(a) (2). New parties[3]

[3] The statute defines "new party" to include not only parties which have recently been created, but also all third parties previously in existence which received less than 5 percent of the popular vote in the preceding presidential general election. I.R.C. § 9002(8). Appellants will use the term as the statute defines it.

are entitled to subsidies *after* a general election in proportion to the vote received in that election, if over 5 percent.[4] § 9004(a) (3). To be eligible for any funds, candidates must qualify to have their names (or the names of electors pledged to them) on the election ballot as the candidate of a political party in 10 or more states. § 9002(2).

A candidate for nomination by a political party for election to the Presidency is eligible to receive matching primary payments if he raises private contributions of $5,000 from residents of each of at least 20 states in amounts of $250 or less. §§ 9037, 9033(b).

(5) *Reporting and Disclosure*

Political committees, as defined by 2 U.S.C. § 431(d), must keep detailed records of the identities of all individuals who contribute more than $10 to them, subject to audit by the FEC. *Id.*, §§ 432(b)-(d) and 438(a)-(d). Political committees and candidates are further required to file periodic reports disclosing the names, occupation, and principal places of business of those who contribute in excess of $100. *Id.*, § 434(b) (1)-(8). Certain resources available to incumbent officeholders, enumerated in *id.*, § 434(d) are not, however, required to be disclosed.

Every person who contributes or expends more that $100 per year other than by contribution to a political committee or candidate (including persons who make "independent expenditures," see p. 8, *supra*, and volunteers with incidental expenses exceeding $600) must also file a report with the FEC disclosing the same information required of political committees and candidates. *Id.*, § 434(e).

Criminal penalties are provided for violation of the disclosure provisions. *Id.*, § 441. Candidates who fail to

[4] Such post-election subsidies are apparently limited to amounts needed to repay outstanding debts, see *infra*, pp. 154-55 n. 12.

file required reports are barred from seeking federal office for a specified number of years. *Id.*, § 456.

Persons (other than individuals) who expend funds or take any action directed at the public designed to influence the outcome of elections or voters' choices, or who publish or broadcast any material referring to a candidate advocating his election or defeat, or setting forth a candidate's voting record or positions on public issues, or who take any action otherwise intended to influence voters, must file reports with the FEC as if such persons were political committees, *id.*, § 437a.[5] Exempt from the statute are certain publications or broadcasts, but certain other publications or broadcasts are not exempted, *id.*

(6) *Federal Election Commission*

The Federal Election Commission (FEC) is composed of six members: two appointed by the president *pro tem* of the Senate on the recommendations of the Senate majority and minority leaders, two appointed by the Speaker of the House on the recommendations of the House majority and minority leaders, and two appointed by the President. All six must be confirmed by a majority of both Houses. 2 U.S.C. § 437c(a) (1).

The FEC has broad powers. It may, *inter alia:* (a) investigate violations and issue subpoenas; (b) exercise primary jurisdiction with regard to civil enforcement of the FECA: (c) refer violations to the Attorney General, who "shall institute a civil action for relief"; (d) formulate general policy with respect to the administration of the FECA, including certain provisions of the criminal code; (e) render advisory opinions; (f) make rules to implement the FECA, *id.*, §§ 437d, 437g.

[5] This section was held unconstitutional by the Court of Appeals (op. at 1549-60), and no appeal from that holding has been filed.

Either the FEC or the Attorney General may bring civil actions (including proceedings for injunctions) against any person who "has engaged, or is about to engage in any acts or practices which" violate the FECA, including certain sections of the Criminal Code, *id.*, § 437g (a).

Any proposed rule or regulation dealing with reports or statements required of Senate or House candidates or committees supporting such candidates must be transmitted to the Senate or the House, respectively. If the House or the Senate, as the case may be, does not disapprove the proposed rule or regulation within 30 legislative days, the FEC may prescribe it. Rules and regulations relating to required reports or statements by presidential candidates or committees supporting such candidates go to both houses and *either* may disapprove any such proposal within 30 legislative days. *Id.*, § 438(c). If the FEC finds that a candidate for federal office has not filed required reports, such person shall be disqualified from candidacy in future federal elections until one year after the expiration of the term of the office he was seeking. *Id.*, § 456.

C. *The Appellants*

1. *James L. Buckley*

James L. Buckley ran for the United States Senate unsuccessfully in 1968 on the New York Conservative Party ticket. He ran again and won on that ticket in 1970. He proposes to run for a second six-year term next year. Findings III, Buckley 1-4, pp. 1-2; App. II-700-01.[6]

[6] All references to the District Court's Findings of Fact, as included in that court's Recertification Decision of May 19, 1975, will be cited in two forms. The Roman numeral will identify the appropriate section of the District Court findings. The number or numbers following the Roman numeral will identify the particular finding or findings cited to (and in the case of all findings from Part III, will include the name of the affiant and/or

(continued)

Buckley's 1970 campaign received substantial amounts in individual contributions greater than $1,000 early in the campaign, and he believes that without such money he could not have run successfully. *Id.*, Buckley 14, 16-19, pp. 4-5; App. II-703-04. Buckley's 1970 campaign raised over $1,800,000. *Id.*, Buckley 17, p. 5, App. II-703. In 1968 and 1970 Buckley relied heavily on volunteer support. Many of these volunteers, approximately 15,000 in 1970, personally defrayed many of their expenses. *Id.*, Buckley 24, p. 7; App. II-705.

Buckley desires to be a member of the majority of the Senate, and he believes that his capacity to affect legislation depends on whether 20 to 30 present incumbents can be defeated. *Id.*, Buckley 35-36, p. 9; App. II-707.

In future campaigns, Buckley desires to make expenditures, to accept contributions, to accept the assistance of volunteers with incidental expenditures, and to preserve the option of making personal and family expenditures, all in excess of the Act's limits; he further desires to accept contributions without making all the disclosure required by the Act. He desires that persons supporting him make independent expenditures exceeding those permitted by the Act. He believes that he will be harmed by these restrictions of the Act. Buckley aff. ¶¶ 20, 28, 30, 40. He also believes that he will be harmed by public financing of presidential elections. Buckley dep. tr. 80-82.

[6] (continued)
deponent from whose affidavit or testimony the findings were derived). The first set of page numbers identifies the pages of the District Court findings as transmitted by that court to the Court of Appeals and lodged with the Court in ten Xerox copies. The "App. __" page citation identifies the pages of the printed Appendix where the findings can be located.

2. *Conservative Party of the State of New York*

The Conservative Party of the State of New York (the Party), established in 1962, has nominated and intends to nominate candidates for the Presidency, U.S. Senator from New York and members of the U.S. House of Representatives from all or nearly all of New York's congressional districts. The Party and affiliated committees register and file reports under the FECA. Findings III, Mahoney 2-4, p. 11; App. II-708-09.

The Conservative Party has solicited and received individual contributions in excess of $1,000 toward the election of its candidates, and desires to do so in 1976. *Id.* The Party intends in the future to contribute in excess of $5,000 to as many of its candidates for federal office as it is able, to expend, if possible, an amount in excess of 2 cents multiplied by New York's voting-age population for its Senate candidate, and to expend in excess of $10,000 for many candidates for the House. *Id.*, Mahoney 7, pp. 12-13; App. II-710. The Party may choose a candidate who can and wishes to expend personal funds in excess of the FECA's limitations. Mahoney aff. ¶ 6. The Party believes that it will be harmed by the subsidy provisions of Subtitle H. *Id.*, ¶¶ 7-8.

During the Party's petition drive in 1962 to establish itself as a political party under New York law, a campaign of harassment was directed at persons who signed the petition. Findings III, Mahoney 8, p. 13; App. II-710.

3. *Eugene J. McCarthy*

Eugene J. McCarthy, a former Senator from Minnesota, is an independent candidate for the Presidency in 1976. His candidacy has no tie to any political party. Findings III, McCarthy 1, p. 17; App. II-712-13.

In his independent candidacy McCarthy and the Committee for a Constitutional Presidency—McCarthy '76 (the

Committee), which is supporting him, are seeking to place his candidacy on the ballot in all 50 states and the District of Columbia. His candidacy involves no primary elections, caucuses, or conventions, and the Committee does not plan to hold a nominating convention. *Id.*, McCarthy 2, p. 17; App. II-713.

In 1968, when he ran for the Democratic presidential nomination, McCarthy received individual contributions in excess of $1,000 and support from many volunteers who gave freely of their time and effort, meeting most of their expenses out of their own pockets. *Id.*, McCarthy 4, 11, pp. 18, 20; App. II-714-15. He has received individual contributions in excess of $1,000 for his 1976 campaign. *Id.*, McCarthy 23, 31, pp. 22-23; App. II-717-18.

McCarthy anticipates considerable informal and unstructured activity by volunteers supporting his 1976 candidacy. *Id.*, McCarthy 19, p. 22; App. II-717. In his current campaign individuals have hesitated to support him financially for fear of the consequences of disclosure of their names. McCarthy dep. tr. 17-18, 67-70. McCarthy believes that the Federal Election Commission, because of its method of appointment and its bi-partisan nature, will not look favorably on independent campaigns. McCarthy aff. ¶ 23.

4. *Committee for a Constitutional Presidency—McCarthy '76*

The Committee for a Constitutional Presidency—McCarthy '76 (the Committee) is a registered political committee under the FECA. It supports the presidential candidacy of plaintiff McCarthy. It plans to engage in legal challenges to state laws which prevent independent candidacies from listing on the ballot. The time and expense involved are problems unique to candidates running outside the two major parties. Findings III, Monroe 2-4, p. 24; App. II-719-20.

The Committee anticipates a need to raise in excess of $24 million for the 1976 presidential campaign. Monroe aff. ¶ 13; Monroe dep. tr. 44. It believes it is impeded by the Act's limitations on individual and organization contributions, Monroe aff. ¶¶ 8, 9, on campaign expenditures, *id.*, ¶ 11, and on volunteer expenses. *Id.*, ¶¶ 14-15. The Committee believes that Subtitle H discriminates against its candidate. *Id.*, ¶¶ 20-21. The Committee desires that its candidate make expenditures, accept contributions, and accept the assistance of volunteers with incidental expenses, all in excess of the Act's limits; it further desires to accept contributions without making disclosure under the Act. It desires that persons supporting its candidate make independent expenditures exceeding those permitted by the Act. It believes that it will be harmed by these restrictions and by the public-financing provisions. *Id.*, ¶¶ 8-17, 20-25.

5. *Stewart R. Mott*

Stewart R. Mott has since 1963 been engaged in supporting political and social movements and certain candidates for political office. Findings III, Mott 1-3, p. 26; App. II-721.

Mott was particularly active in the Vietnam protest movement, supporting candidates who favored extrication of the United States from Vietnam, and making independent efforts to affect public policy. In 1968 Mott worked as a volunteer for Eugene McCarthy's nomination for President, gave over $200,000 to that effort, and spent several thousand dollars of his own unreimbursed money for travel, telephone, etc., in connection with political campaigns. He paid for newspaper advertisements to encourage Nelson Rockefeller to present himself as a Republican alternative to Richard Nixon. Mott contributed well in excess of $1,000 to an authorized Rockefeller presidential committee. *Id.*, Mott 4-8, pp. 26-27; App. II-721-22.

After 1968 Mott became a member of the National Committee for an Effective Congress (NCEC), and worked with that group to elect candidates for Congress. In 1970 Mott organized "Peace, Inc.," and donated over $30,000 to Congressional candidates supporting U.S. withdrawal from Vietnam. Beginning in 1971 he made financial contributions to George McGovern totaling well over $350,000. Mott also incurred some $50,000 for personal expenses on McGovern's behalf in 1972. Through the 1972 campaign Mott financed independent political activities critical of Edmund Muskie and Richard Nixon. In 1972 Mott contributed to candidates for the House and Senate, both incumbents and non-incumbents. Sixteen of these contributions were in excess of $1,000. *Id.*, Mott 9-18, pp. 28-30; App. II-722-25.

In future elections, Mott desires to make contributions, to make incidental expenses as a volunteer, and to make independent expenditures, all exceeding the Act's limits. He believes he and his political goals will be harmed by these restrictions. Mott aff. ¶ 31.

6. *William A. Steiger*

William A. Steiger represents Wisconsin's Sixth Congressional District in the House of Representatives, and has done so since 1967. He is considering a candidacy for federal office in 1976; it is possible that he will be a candidate for the U.S. Senate. Steiger believes that the Act will enhance his chances of reelection to the House and—by the same token—will severely hinder his ability to challenge the candidacy of one of his state's incumbent Senators. Findings III, Steiger 1, p. 33; App. II-727-28.

In 1966 Steiger received contributions of $4,000 each from his father and from the Wisconsin Republican Party. *Id.*, Steiger 19-20, p. 39; App. II-732. Steiger desires to spend the amounts necessary and available to convey his views to

the citizens meaningfully. If unable to do so, he believes that his campaign will be injured and the political efficacy of his supporters impaired. Steiger aff. ¶ 33.

7. *New York Civil Liberties Union*

New York Civil Liberties Union (NYCLU) is an affiliate of the American Civil Liberties Union (ACLU); its Executive Director is Ira Glasser. Findings III, Glasser 1, p. 41; App. II-733.

NYCLU, as a principal function, disseminates within New York State information concerning constitutional rights. NYCLU is barred by the ACLU's constitution from endorsing or opposing candidates for public office. However, NYCLU, among other activities, frequently criticizes public officials whose conduct it believes violates civil liberties. *Id.*, Glasser 2-3, p. 41; App. II-733-34. NYCLU takes frequent and controversial positions on public issues. Glasser aff. ¶ 3, Glasser dep. tr. 120. NYCLU praises, criticizes, describes and rates the conduct of clearly identified public officials who may be candidates for federal office. Findings III, Glasser 4, pp. 41-42; App. II-734. NYCLU has bought newspaper advertisements costing more than $1,000 critical of then-Governor Rockefeller with respect to Attica, critical of then-President Nixon with respect to school busing, and critical of President Ford for pardoning Mr. Nixon. Glasser intends to publish other similar advertisements. Glasser aff. ¶¶ 5-10; Glasser dep. tr. 16, 92, 110, 117, 126.

NYCLU published a membership newsletter approximately six times a year, at a cost exceeding $1,000 per issue, delineating NYCLU's views on public issues and the positions taken on such issues by public officials, some of whom are candidates for federal office. Findings II, Glasser 5-8, p. 42; App. II-734-35.

8. *Mississippi Repubican Party*

The Mississippi Republican Party (the Party) is part of the national Republican Party. The Party has nominated and intends to nominate candidates for the Presidency, U.S. Senator, and members of the U.S. House of Representatives. Findings III, Reed 1, p. 48; App. II-738-39.

In 1972 the Party's State Central Committee voted not to solicit, receive, or expend money on behalf of candidates for federal office because it opposed in principle the requirements imposed by the FECA. *Id.* The Central Committee will not contribute over $1,000 to any future candidate for federal office in order to protect the confidentiality of its contributors. *Id.*, Reed 3, p. 49; App. II-739 Many Party members fear that they would suffer adverse consequences from disclosure of their political contributions. *Id.*, Reed 8, p. 49; App. II-740. One consequence has been that the Party has received a large number of $99 contributions. *Id.*, Reed 11; Reed dep. tr. 31-32.

Some Mississippi Republicans have contributed more than $1,000 to Party candidates for federal office. Prior to the FECA, the Party contributed directly to candidates for federal office, including, in some cases, contributions in excess of $5,000. *Id.*, Reed 10-13, p. 50; App. II-740-41. The Party's basic fund-raising system, accounting for two-thirds of the funds used to run its base operations, is a bank-draft system, which raises, from monthly $10 contributions, yearly individual contributions exceeding $100. *Id.*, Reed 7, 9, pp. 49-50; App. II-740.

Only one Party candidate for federal office has beaten an incumbent, in a 1964 House race. *Id.*, Reed 16, p. 51; App. II-741-42.

In future campaigns, the Party desires to make expenditures on behalf of its candidates, to have its candidates make expenditures, to have its candidates accept

contributions, and to have its candidates expend personal or family funds all in excess of the Act's limits; it further desires that it and its candidates accept contributions without making the disclosure required by the Act. It desires that no public funds be spent on presidential elections. The Party believes it will be harmed by the provisions of the Act mentioned above. Reed aff. ¶¶ 10-12, 15-18, 20-23, 27-44.

9. *Conservative Victory Fund*

The Conservative Victory Fund (CVF) is a registered political committee under the FECA, affiliated with the American Conservative Union (ACU). CVF and ACU have most of their officers in common, they share office space, and they work on common matters in some cases. CVF was established in 1970 to raise funds to aid the election of conservative candidates for public office. CVF itself pays no salaries. Findings III, Roberts 1-4, p. 52; App. II-742.

In 1970, 1972, and 1974 CVF contributed in excess of $5,000 to each of certain candidates for federal office, including both challengers and incumbents. In these three election campaigns CVF contributed a total of approximately $370,000 to the campaigns of 179 candidates for the House and Senate. *Id.*, Roberts 7-8, pp. 53-54; App. II-743-44.

CVF is not connected to any political party, and it does not now plan to form a new political party. *Id.*, Roberts 12, 15, pp. 54-55; App. II-744. However, a new political party is being discussed among conservatives, and if such a party is formed, it is possible that CVF would be involved in raising funds for a nominating convention and a campaign for President. Roberts dep. tr. 42-43.

CVF believes that the limitations the Act places on contributions by political committees, single and aggregate contributions by individuals, expenditures of family or personal funds by a candidate, and overall expenditures by

a candidate will harm it. CVF desires to receive the maximum amount of money it can from individuals, and to continue to contribute to conservative challengers to incumbent officeholders. Roberts aff. ¶¶ 8, 16, 18; Roberts dep. tr. 12-17, 34-35.

10. *American Conservative Union*

The American Conservative Union (ACU), established in 1964, has made contributions to candidates for federal office, including one $2,500 contribution. Findings III, Joy 1, 3, 12, pp. 59, 61; App. II-747-49. ACU desired to contribute to that candidate as much as its resources permitted. Joy dep. tr. 7-8, 11-12.

ACU has engaged in lobbying activities, and it publishes annual ratings of all members of Congress. These ratings list voting records, showing positions on issues of interest to ACU. ACU also distributes statements on its positions with respect to public issues and political candidates. Findings III, Joy 4-6, p. 60; App. II-748.

ACU believes that limitations on contributions by political committees, and other provisions of the Act, severely decrease ACU's ability to make its views effective. Joy aff. ¶ 4; Joy dep. tr. 21-22.

11. *HUMAN EVENTS, INC.*

HUMAN EVENTS, INC., publishes a weekly newspaper dealing primarily with events of political importance and with public issues, public officials, and candidates. Findings III, Winter 1-2, p. 56; App. II-745.

HUMAN EVENTS each election year discusses selected electoral contests of interest to its readers. HUMAN EVENTS has also published articles on various presidential candidates. HUMAN EVENTS endorses

explicitly or by implication certain candidates for federal office. *Id.*, Winter 3-5, 8, pp. 56-58; App. II-745-47.

12. *Libertarian Party*

The Libertarian Party (the Party) was formed in December, 1971, and held its first nominating convention in June, 1972. Its nominee for President, although on the ballot in only two states, traveled extensively and received one vote in the electoral college. The ticket's popular vote was approximately 10,000. By 1974 the Party membership had grown to 5,000 individuals. Major campaigns were run in 1974 in several federal elections. The Party is now organized in 40 states. Findings III, Crane 2-5, pp. 63-64; App. II-750-51.

The Party estimates that it has received approximately 10 individual contributions exceeding $1,000. Approximately five other individuals have indicated that they would contribute more than $1,000. *Id.*, Crane 7-9, pp. 64-65; App. II-751-52.

In its future campaigns the Party desires that its candidates make expenditures, accept contributions, and accept the assistance of volunteers with incidental expenses, all in excess of the Act's limits; it further desires that its candidates accept contributions without making the disclosure required by the Act. It desires that persons supporting its candidates be able to make independent expenditures exceeding the Act's limits. It believes that it will be harmed by these restrictions and by the public-financing provisions. Crane aff. ¶¶ 10-11.

D. *Decision of the Court of Appeals*

Relying heavily on what it perceived as the public's perception of corruption in government, the majority found ample justification for congressional attempts to reform the electoral process. In particular, the majority found a "compelling need" for equalizing the power of citizens to influence the course and outcome of elections and for restricting the political influence of wealth (op. at 1510-20).

On the basis of such considerations the majority, without further significant constitutional discussion, approved the limitations on contributions, expenditures, and independent expenditures (op. at 1528-41).

The majority also upheld the constitutionality of the disclosure provisions of the challenged legislation, holding that the disclosure thresholds are not too low and that the showing in the record of chilling effect on and harassment of minor parties and their contributors is insufficient to overcome the presumption of constitutionality of disclosure as applied to independent and minor-party candidates (op. at 1541-49). [7]

The majority held that the Congress may constitutionally appropriate public funds for the support of partisan political activities in the conduct of presidential nominating conventions and campaigns, and that the formulas for distribution of the moneys chosen by Congress in Subtitle H do not unconstitutionally discriminate against minor and new parties and independent candidacies. The majority further held that four-year-old voting patterns were permissible as means for determining the entitlement to federal funds (op. at 1560-70).

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[7] However, the Court unanimously invalidated the provision for disclosure by "certain persons" other than political groups, 2 U.S.C. §437a, a ruling from which no appeal has been taken by the appellees.

Finally, the majority upheld the method of appointment and some of the powers of the Federal Election Commission. The constitutionality of some of the principal enforcement, supervisory, and investigatory powers of the Commission were found not ripe for decision (op. at 1570-80).

Chief Judge Bazelon dissented with respect to the constitutionality of disclosure of campaign contributors to nascent political parties. Judge Bazelon would have held that such compelled disclosure by minor and new parties impermissibly intrudes upon basic rights of associational privacy as guaranteed by the First Amendment (op. at 1593-97).

Judge Tamm, joined by Judge Wilkey, dissented from the Court's holdings with respect to the constitutionality of contribution and expenditure limitations, the financing of federal elections by the means established in Subtitle H, and the powers and method of appointment of the Federal Election Commission (op. at 1598-1609).

In a separate opinion Judge MacKinnon also dissented with respect to the powers and method of appointment of the Commission (op. at 1609-23).

SUMMARY OF ARGUMENT

I.

The challenged statutes are the most far-reaching regulation of political communication in the history of the republic. The Court of Appeals failed to give the legislation the critical scrutiny requisite under long-accepted First Amendment principles. *Erzoznik* v. *City of Jacksonville*, 43 U.S.L.W. 4809 (June 23, 1975). Especially close scrutiny is required of these statutes under the accepted tests of constitutionality because (1) they were adopted without adequate attention to their consequences; (2) they fundamentally alter the political process — the core of the First Amendment — and thus affect the rules by which all other rules are made, *Kovacs* v. *Cooper*, 336 U.S. 77, 96 (1949) (Frankfurter, J., concurring); *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); and (3) they were enacted by legislators who faced a plain conflict of interest, since the statutes in many ways affect the political balance between challengers and incumbents.

The Court of Appeals incorrectly applied *United States* v. *O'Brien*, 391 U.S. 367 (1968), to analyze the statutes' restrictions on political speech. Since virtually every political communication involves the expenditure of money, expenditures for political purposes are protected by the First Amendment. *United States* v. *Auto Workers*, 352 U.S. 567, 594 (1957) (Douglas, J., dissenting). Limiting the use of money for political purposes amounts to restricting the communication itself. Similarly, contributions for political purposes are both a means for contributors to express their political ideas and the necessary prerequisite for candidates for federal office to communicate their views to voters. Contributions are crucially important in determining the level of political debate and in implementing the freedom of association guaranteed by the First Amendment.

Political contributions and expenditures may be regulated only when the regulation is limited to non-speech elements or protects a governmental interest unrelated to freedom of expression. The line regulation must walk is the line between speech assimilated into regulable activity (*e.g.*, bribery) and speech directed at persuading voters to make political choices (*e.g.*, the typical political expenditure or contribution). The Court of Appeals failed to walk this line; instead it denigrated political campaigns by labeling them "Romanesque political extravagances," thus evaluating the content of speech and dismissing it as unworthy of protection. *Police Department of Chicago* v. *Mosley*, 408 U.S. 92 (1972)

II.

The Court of Appeals offered three justifications to support the challenged statutes, none of which can sustain them.

(1) Allegations about the "skyrocketing" costs of political campaigns are unsupported by the facts, and lack perspective when compared to increases in other relevant variables. Particularly when compared to increases in the perquisites of office that incumbent members of Congress appropriate for themselves, campaign costs — a vital element of self-government — are modest. If anything, Americans spend too little to finance the process by which their government is chosen.

(2) Private campaign financing does not, as the Court of Appeals believed, foster inequality of political expression. Large contributions are made on behalf of the whole spectrum of political persuasion. They frequently benefit society's least powerful. And they enable political candidates to overcome other inequalities exacerbated by the challenged statutes, such as differences in name recognition, the perquisites of incumbents, and inequality

of access to the media. *Cf. Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974).

(3) The challenged statutes do nothing to reduce either the fact or the appearance of corruption. They enhance rather than diminish the power of so-called "special interests," even allowing government contractors more involvement in campaign contributions than prior law permitted. Properly drafted disclosure statutes, the regulation of cash contributions, and other precisely tailored measures would provide measures both far more effective against corruption and far less intrusive on constitutional rights than the challenged legislation.

III.

The FECA's limits on the expenditures political parties, committees and candidates can make in election campaigns are in flat violation of the First and Fifth Amendments. They are explicit limitations on political speech, and will result in an unjustifiable diminution in the levels of campaign activity and political debate. The national interest demands full and robust debate during political campaigns. *Mills* v. *Alabama*, 384 U.S. 214 (1966). Limiting campaign expenditures unconstitutionally closes important channels of political communication, and restricts the ability of the average citizen to participate effectively in the process by which his leaders are chosen. The highest courts of two states have recently invalidated expenditure limitations on these grounds. *Deras* v. *Myers*, Ore. , 535 P.2d 541 (1975); *Bare* v. *Gorton*, 84 Wash. 2d. 380, 526 P. 2d 379 (1974).

Expenditure limits will have their most injurious effects in races for truly contested House and Senate seats by preventing effective competition. The FECA limits discriminate generally against candidates challenging incumbent officeholders in favor of their opponents.

Williams v. *Rhodes*, 393 U.S. 23 (1968). Victorious challengers must typically spend in excess of the expenditure limits in order to overcome the enormous resources available to incumbents as perquisites of their offices. Those perquisites have a political impact even when scrupulously used for non-political purposes. Incumbent officeholders have an enormous stake in their own reelection. They have been dramatically increasing their own perquisites in recent years while at the same time limiting what challengers may spend.

The security in office of incumbent members of Congress has been steadily increasing. The FECA expenditure limits, by making it more difficult for candidates espousing change to win elections, will make American politics more unresponsive and will inevitably lead to an increase in alienation and apathy — two ills the statutes were supposed to cure.

Independent candidates and political parties without a national committee are discriminated against by provisions allowing national and state committees of political parties to spend in excess of the candidate-expenditure limits. Such distinctions serve no purpose other than discrimination between different kinds of political movements and are therefore abridgements of First Amendment rights of association and speech.

IV.

The FECA limits citizens in spending money, completely independently of political campaigns or campaign organizations, to advocate or oppose the election of a "clearly identified candidate." Publication of individual speech concerning political candidates is limited to an expenditure far less than the cost of a single full-page advertisement in the New York Times or the Washington Post. The statutes thus undercut a primary forum for the

expression of opinion, the paid editorial advertisement. *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

This provision effectively limits participation in the electoral process to (1) the candidates' campaign organizations and (2) the mass media. While these groups play vital and important roles in the political process, enhancing their relative power by stifling expression by individual citizens and independent groups, which greatly enriches the public debate, is constitutionally indefensible.

V.

The FECA's limitations on contributions to political candidates by individuals and groups violate the constitutional rights of donors, candidates, and volunteer political workers. Limits on contributions will neither reduce corruption nor equalize political speech.

Contribution limits discriminate invidiously against challengers to incumbents, minor parties and independent candidates by making it more difficult for such parties and candidates to compete effectively in the electoral process. Large contributions have functioned as "seed" money for groups advocating social change throughout our history, and they play the same role in political campaigns. In closely contested races in particular, large contributions received relatively early in the campaign provide the wherewithal to raise larger amounts of money (generally in smaller contributions) to be used in the campaign. Limiting large contributions thus lessens political participation and reduces the level of political debate.

Limits on the incidental expenses of volunteers restrict rights of speech and association, *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), yet serve no compelling governmental interest and invite discriminatory enforcement.

Providing substantially higher limits on contributions by a candidate or his family than on contributions by others impermissibly discriminates against candidates without personal wealth. *Bullock* v. *Carter*, 405 U.S. 134 (1972).

The requirements that political committees must meet before they may contribute to candidates violate the First and Fifth Amendments by placing irrational restrictions on the exercise of protected rights of political expression and association. *Kusper* v. *Pontikes*, 414 U.S. 51 (1973). Moreover, these restrictions enhance the power of already organized and established interest groups, contrary to the rationale supposedly justifying the statute.

Finally, the contribution limits are overbroad. The same limitations apply no matter what federal office is being sought. They do not take into account differences among potential recipients (*e.g.*, differences between presidential candidates granted federal funding for presidential campaigns and those denied such funding), and they ignore several less intrusive means such as properly drafted disclosure statutes. *United States* v. *Robel*, 389 U.S. 258 (1967); *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964).

VI.

The federal subsidy provisions of Subtitle H violate the general-welfare clause of the Constitution by giving money directly to political parties and candidates. There is no public interest in relieving candidates of the need to raise money to finance their political activities, and none of the legislative rationales supports these provisions. Direct financing also effectively establishes the two major parties, requires an allocation formula which necessarily discriminates invidiously against some candidates, leads to excessive government entanglement in the affairs of political parties, and encourages continuous struggles in

Congress over who is to have what political power. *Meeks* v. *Pittenger*, 43 U.S.L.W. 4596 (May 19, 1975); *Lemon* v. *Kurtzman*, 403 U.S. 608 (1971). Even if some method of federal funding is permissible, far less intrusive means are available.

Chapter 95 (general-election subsidies) allocates federal subsidies in a discriminatory and to some extent random fashion with respect to third parties and independent candidates by effectively excluding them from public financing because they are thought to have no chance to win office, while subjecting them to the limits on contributions because they might be corrupted. Four particularly discriminatory features are: (1) the use of a prior-vote criterion to determine the level of funding; (2) the fact that major parties receive the full subsidy prior to the November election, while small and new parties and independents receive nothing until after the election (if anything even then); (3) only general-election candidates on the ballot in ten or more states are eligible at all; and (4) only general-election candidates receiving 5 percent or more of the popular vote are eligible at all. *Williams* v. *Rhodes, supra; Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957).

Chapter 96 (pre-nomination subsidies) discriminates against candidates who raise contributions in less than twenty states, those who seek ballot positions through petitions (because no federal funding is provided for obtaining ballot status), and those who lack the support of organized interest groups with state affiliations which can easily make certain candidates eligible for primary matching grants. *Lubin* v. *Panish*, 415 U.S. 709 (1974).

VII.

Although disclosure of certain contributions enables voters to make informed electoral choices, and the government may legitimately require disclosure to that end, the FECA disclosure requirements are unconstitutionally overbroad. They intrude on protected rights of associational privacy, and deter individuals from making political contributions by subjecting them to the fear of harassment in their business and employment relationships. *NAACP* v. *Alabama*, 357 U.S. 449 (1958).

Minor-party and independent candidates face particular difficulties, as the Court of Appeals recognized, and Chief Judge Bazelon emphasized in his dissent. The various interests justifying disclosure do not support the sweep of the FECA's disclosure provisions which treat all parties and candidates indiscriminately. *Pollard* v. *Roberts*, 283 F. Supp. 248 (E.D. Ark.), *aff'd per curiam*, 393 U.S. 14 (1968).

There is no substantial nexus between the claimed governmental interests and the disclosure thresholds. Disclosure should be required only of those contributions whose donors may seek to influence governmental action unlawfully. The threshold of disclosure should be much higher, and calibrated to the office involved, rather than set at a single, arbitrary threshold for all federal offices. *United States* v. *Rumely*, 345 U.S. 41 (1953).

The provisions imposing disclosure and burdensome reporting requirements on individuals who make independent expenditures of more than $100 serve no legitimate purpose and have a chilling effect on political expression.

VIII.

The enforcement provisions of the challenged statutes are unconstitutional in two major respects. First, vesting the power to nominate and appoint four of the six members of the Federal Election Commission (FEC) in the major-party leadership in Congress violates Article II, Section 2 of the Constitution, which vests the power of appointment of officers of the United States in the President. FEC members must be appointed by the President if the FEC has any substantial powers which Congress itself could not exercise, and the FEC plainly does have such powers. *Springer* v. *Government of the Philippine Islands*, 277 U.S. 189 (1928). Even under the test used by the Court of Appeals, the FEC is vested with *primarily* executive and judicial duties and therefore must be appointed by the President. Even if some of the FEC's powers have not yet been utilized, the appointment issue is ripe for adjudication, since the issue is whether Congress may constitutionally create the commission it did, not whether the FEC may at some time in the future employ its full battery of powers.

Second, the enforcement provisions give the FEC the power to stand astride American politics in a fashion far more intrusive and chilling than the Constitution permits. *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965). The FEC has virtually unfettered discretion to enforce statutory provisons that are often hopelessly vague. The possibility for discriminatory enforcement is particularly high since the FEC is dominated (by virtue of several statutory provisions) by incumbent members of Congress, one of the very interests the FEC is supposed to regulate. Similarly, Subtitle H allows the FEC and the Secretary of the Treasury excessive discretion in allocating federal subsidies to presidential candidates.

The FEC's power to disqualify citizens from federal candidacy plainly conflicts with constitutional provisions governing qualifications for federal office. *Powell* v. *McCormack*, 395 U.S. 486 (1969).

ARGUMENT

I.

The Court of Appeals Failed To Subject the Challenged Legislation to the Critical Scrutiny Necessary When Fundamental Rights Are at Stake.

The challenged legislation massively reorders the American political process. It avowedly and drastically regulates peaceful political communication. It subjects candidates and their supporters to a panoply of sanctions, including criminal penalties, for what since the beginning of the republic have been customary campaign activities. It envelops every participant in the political process in a complex, burdensome, often ambiguous maze of regulation.

This legislation is beyond question the most far-reaching regulation of political communication in the history of the republic. It touches upon rights indispensable to the preservation of our other freedoms. In addition, it deals entirely with matters in which those who enacted the law have a considerable self-interest. As a result, the legislation does not carry the normal presumption of constitutionality. Rather, it requires an exceptionally critical exercise of judicial review.

A. *Both Principles General to First Amendment Cases and Factors Unique to This Legislation Require Far More Exacting Scrutiny Than the Court of Appeals Accorded.*

The Court of Appeals failed to give this legislation adequate scrutiny. It wholly failed to examine the actual impact of the statutes on the political process. It uncritically deferred to legislative judgments as to what means were appropriate, and did not examine whether there was a rational—let alone necessary—relationship between the ends sought and the means chosen.

Before upholding a law imposing restrictions on speech, the courts must determine, at the very least, that: (1) the governmental interest in the restriction is unrelated to the suppression of free expression; (2) the governmental non-speech interest is legitimate and compelling; (3) the threat to this interest is real and not merely speculative; (4) the restriction on speech is incidental or indirect; (5) the means employed are rationally and precisely related to the protection of the governmental interest and are the least intrusive available; and (6) the specified enforcement process is impartial, well monitored and well suited to the highly sensitive task involved. See *Erznoznik* v. *City of Jacksonville*, 43 U.S.L.W. 4809 (June 23, 1975); *New York Times* v. *United States*, 403 U.S. 713 (1971); *Kramer* v. *Union Free School District*, 395 U.S. 621 (1969); *United States v. O'Brien*, 391 U.S. 367, 377 (1968); *United States v. Robel*, 389 U.S. 258 (1967); *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964); *New York Times* v. *Sullivan*, 376 U.S. 254 (1964); *Sherbert* v. *Verner*, 374 U.S. 398 (1963); *Speiser* v. *Randall*, 357 U.S. 513 (1958); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940).

Plaintiffs will demonstrate, as to each section of the challenged statutes, that one or more—usually several—elements of this test cannot be met. At this point, we identify those factors unique to this legislation which suggest that the closest scrutiny under the tests are enumerated is warranted.

(1) This action challenges the constitutionality of laws enacted under the banner of reform in the wake of America's worst political scandal. History demonstrates, however, that claims that government and the political process are being subverted, whether by a foreign power, a totalitarian ideology or powerful economic interests, often generate demands for protective action which may lack discrimination. Not infrequently, the fear of subversion and zeal for new law are far more substantial than the evidence

generating them. And, not infrequently, the measures taken are adopted without adequate attention to all their consequences and implications.

At issue is not the worthiness of the intentions of those seeking reform but the constitutionality of the final legislative product. As Mr. Justice Brandeis wrote, "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding." *Olmstead* v. *United States*, 277 U.S. 438, 479 (1928) (dissenting opinion). And Mr. Justice Black has noted, "history indicates that the urge to do good has led to the burning of books and even to the burning of 'witches.' " *Beauharnais* v. *Illinois*, 343 U.S. 250, 274 (1952) (dissenting opinion.)[1]

Some public-opinion polls relied upon by appellees and the Court of Appeals (op. at 1514) tend to demonstrate that public alienation and mistrust of the political process are at a high level, as is the belief that government is run by a few big interests. Findings I, 133 and 149-55, pp. 114-28; App. II-159-89, 206-53. Even assuming that election practices are a major cause of this alienation (an improbable assumption given the events of the past fifteen years), and even assuming that the challenged legislation will operate to lower that alienation and mistrust (an assumption that is surely incorrect, see *infra*, pp. 67-75), the implication that

[1] In striking down certain portions of New York's campaign control laws, a three-judge court recently wrote that " . . . when the State through the guise of protecting the citizen's right to a fair and honest election tampers with what it will permit the citizen to see and hear even that important state interest must give way to the irresistible force of protected expression under the First Amendment." Vanasco v. Schwartz (E.D.N.Y. July 14, 1975), 74 Civ. 1533, slip op. at 20-21.

fundamental constitutional guarantees of political freedom can be swept aside by the latest Harris Poll is a remarkable view of the Constitution.[2]

(2) Where legislation infringes on First Amendment political rights, and especially where one group limits the political freedom of others, searching and critical scrutiny is essential and a broad presumption of constitutionality unjustifiable. Thus Mr. Justice Frankfurter, even while denying the "preferred position" of First Amendment rights, nevertheless declared that "those liberties of the individual which history has attested as the indispensable conditions of an open as against a closed society come to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements." *Kovacs* v. *Cooper*, 336 U.S. 77, 95 (1949) (concurring opinion).

This Court has held that "[t]here is practically universal agreement that a major purpose of the Amendment was to protect the free discussion of governmental affairs." *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966). And "speech concerning public affairs is more than self-expression; it is the essence of self-government." *Garrison* v. *Louisiana*, 379 U.S. 64, 74-75 (1964). See Kalven, *The Negro*

[2] In a 1970 CBS poll, people were asked "As long as there appears to be no clear danger of violence, do you think any group, no matter how extreme, should be allowed to organize protests against the government?" *Seventy-six percent replied "no,"* while only twenty-one percent answered "yes."

The same poll asked "Do you think everyone should have the right to criticize the government, even if the criticism is damaging to our national interest?" *Fifty-four percent replied "no,"* while only forty-two percent said "yes." CBS News Reference Book-Public Opinion: Changing Attitudes on Contemporary Political and Social Issues, 5-8 (1972).

Clearly, if the First Amendment turns on public opinion polls, freedom of speech, press, and assembly are in serious jeopardy.

and the First Amendment 59-64 (1966). As Professor Meiklejohn put it, "The First Amendment does not protect a 'freedom to speak.' It protects the freedom of those activities of thought and communication by which we'govern.' It is concerned, not with a private right, but with a public power, a governmental responsibility." Meiklejohn, "The First Amendment as an Absolute," 1961 Sup. Ct. Rev. 245, 255. Judicial scrutiny is thus at its greatest when there is a claim of infringement of the freedom of political communication, for such claims touch upon what this Court has identified as the "central meaning of the First Amendment." *New York Times* v. *Sullivan*, 376 U.S. 254 (1964).

The First Amendment by its very terms suggests that our primary national policy is *no* regulation in the area of political communication. See *Columbia Broadcasting System, Inc.*, v. *Democratic National Committee*, 412 U.S. 94, 126 (1973). This is not a costless policy, for unhampered expression may well be harmful—for example, through the circulation of falsehoods against a candidate. It may also risk occasional physical confrontation by permitting controversial, insulting, and provocative demonstrations, or seem unfair by permitting the exclusion of certain points of view by private publications. But freedom of any kind imposes costs, and the First Amendment dictates at the very least that such costs are presumptively less than those entailed in restrictive control by law. See *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974); *New York Times* v. *Sullivan*, *supra*; *Edwards* v. *South Carolina*, 372 U.S. 229 (1963). As Mr. Justice Brandeis said: "[f]ear of serious injury cannot alone justify suppression of free speech and assembly . . . . Those who won our independence were not cowards. They did not fear political change. They did not exalt order at the cost of liberty." *Whitney* v. *California*, 274 U.S. 357, 376-77 (1927) (concurring opinion).

The freedom to engage in peaceful political communication not only is guaranteed by the First Amendment, although that would be sufficient, but inheres in every constitutional provision relating to democratic, representative government. Without that freedom, the plain intent and effect of those other provisions might easily be vitiated. *Stromberg* v. *California*, 283 U.S. 359, 369 (1931). If candidates or other citizens are not free to disseminate political information, to criticize officials, to engage in political advocacy—and to spend the money that it costs to do so—the competition for elective office which makes democratic government responsive government will be gravely weakened. Constitutional provisions protecting the integrity of elections and guaranteeing the right to vote will become abstractions having no relation to the actual functioning of the organs of power. An honest mistake in legislative judgment in this area carries with it consequences potentially far more dangerous than in areas such as economic or safety regulation. See *United States* v. *Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938).[3] Mistakes here go to the heart of political freedom, and because they may permanently change the political process—the very process counted on to correct error—they may well be irredeemable. Thus Mr. Justice Cardozo described freedom of speech and thought as "the matrix, the

[3] Although the Court of Appeals chided the appellees for asserting that the standards of review applicable to economic regulation should be used to judge the challenged statutes (op. at 1519), the court itself substantially adopted that theory. Citing cases upholding the Alabama Unemployment Compensation Law, Steward Machine Co. v. Davis, 301 U.S. 548 (1937), and the Federal Social Security Act of 1935, 49 Stat. 620, Carmichael v. Southern Coal Co., 301 U.S. 495 (1937), the court in effect declined to apply the "least intrusive means" test once it decided that some limitation on, for instance, contributions was within Congress' power (op. at 1518).

indispensable condition of nearly every other form of freedom." *Palko* v. *Connecticut*, 302 U.S. 319, 327 (1937).

The constitutional approach to legislation infringing on political liberties differs in other essentials from that of economic regulation. In the latter case, legislatures are permitted to make distributional judgments between groups as to the benefits of regulation, *Daniel* v. *Family Sec. Life Ins. Co.*, 336 U.S. 220 (1949), on the basis of data which the courts will rarely second-guess, *Williamson* v. *Lee Optical*, 348 U.S. 483 (1955). Indeed, it is the essence of a pluralistic democracy that the results of group interplay with respect to economic regulation not be upset by a non-elected branch.

Where political liberties are involved, however, gross distributional judgments among groups are not permitted because individual rights which attach to every citizen are at stake. Courts cannot, in those circumstances, show great deference to legislative judgment, for political liberty can be protected only by a highly particularistic inquiry into the need for the legislation in question and its impact on particular individuals and groups. Whereas the grossest correlation of ends and means can save regulation of an economic nature, *Railway Express Agency* v. *New York*, 336 U.S. 106 (1949), only the strongest interest of the state can justify stilling even a highly individualistic act of anger so long as it implicates political communication. See *Street* v. *New York*, 394 U.S. 576 (1969); *Schneider* v. *Irvington*, 308 U.S. 147, 161 (1939).

(3) Searching judicial scrutiny is necessary for yet another reason: those controlling the political branches of government have an enormous stake in how the political dialogue is carried on, and cannot be expected to regulate that dialogue with a fine impartiality. Officeholders are, of necessity and quite legitimately, concerned with the preservation and enlargement of their own and their supporters' political power. It merely recognizes fact, rather than casts aspersion, to acknowledge that this concern must affect the content of any regulation of political communication.

History has not been kind to legislation "cleansing" the political process of disfavored activities of opponents of those in power. The challenge to the Sedition Act of 1798, 1 Stat. 596, for example, while never heard by this Court, "has carried the day in the court of history." *New York Times* v. *Sullivan*, 376 U.S. at 276. That it has no doubt stems from a recognition that "it is a profound tenet of democracy that no government official has the legal power to silence such commentary about himself." Kalven, *The Negro and the First Amendment* 15 (1966).

This Court has held that the presumption of constitutionality draws its strength from the assumption that legislative structure provides fair representation of "all the people" and that, when the constitutional issue entails a challenge to that assumption, the presumption is weakened. *Kramer* v. *Union Free School District*, 395 U.S. 621, 628 (1969). Claims such as those made here, that a majority is trying to limit the political communication of a minority or that incumbents are attempting to restrict the political activities of challengers, are just such an attack upon the assumption. This point in fact is the simple proposition that great deference to legislative decisions cannot be justified in the face of a plain conflict of interest.

The court below upheld extensive and unprecedented restrictions on political communication on the grounds that "[t]he wiles of ambitious office seekers and their supporters are not easily cabined" (op. at 1518). It should have recalled that every one who voted for this legislation is such an office seeker.

Notwithstanding these reasons unique to this legislation which should have prompted the closest scrutiny, the

court below failed to give the challenged legislation even the normally careful scrutiny required when First Amendment rights are at stake.[4] Rather, it relied upon the expressed intent of the sponsors of the legislation to eliminate corruption, to redress inequality, to reduce the power of special interests by eliminating the "corrosive influence" of campaign money, and to prevent another Watergate (op. at 1510-16). Whether the record really suggests the baleful state of affairs described by the sponsors, whether the legislation may indeed aggravate rather than cure the identified abuses, and whether far less intrusive means are available received only cursory examination to the extent addressed at all.

B. *The Expenditure or Contribution of Money for Political Purposes Is Protected by the First Amendment and May Be Regulated Only in Carefully Defined Circumstances.*

The primary reason for the failure of the court below to afford the necessary scrutiny was its conclusion, premised upon *United States* v. *O'Brien, supra,* that all contributions and expenditures for political purposes are so infected with "non-speech elements" that virtually unlimited regulation is permissible. Indeed, it not only upheld the extensive restrictions of the present legislation but went on to say that they "may well be not enough" (op. at 1582).

O'Brien does not sustain such an analysis. In *O'Brien,* this Court held that Congress may prohibit the destruction of a draft card even when that destruction serves as the symbolic expression of an idea. The Court said no more than that speech incidental to regulable conduct might be limited; it did not in any sense endorse the wholesale supression

[4] The Court of Appeals' majority opinion acknowledged elements of the proper standard of review (op. at 1516-20), but the opinion comes nowhere near the searching and critical inquiry that the court itself agreed was necessary.

of speech. It did not, for example, hold that all speech opposing the draft might be suppressed since some of it entailed the burning of draft cards.

That campaign expenditures and contributions have the status of protected speech does not mean that certain contributions or expenditures may not, because of the particular circumstances surrounding them, be regulated because they entail minimal elements of protected speech or seem to entail an immediate and high danger of a *quid pro quo.* Drawing any such lines, however, must follow a study of the nature of the abuses demonstrated in the record and of the actual impact of the challenged legislation on the political process.

(1) *Expenditures for Political Purposes Are Protected by the First Amendment.*

Expenditures for political purposes, whether by an individual or a group on behalf of a cause or of a candidate, or by candidates on behalf of themselves, are essential to political speech and are protected by the First Amendment.

As Mr. Justice Douglas once noted:

> "The making of a political speech up to now has always been one of the preferred rights protected by the First Amendment. It usually costs money to communicate an idea to a large audience. But no one would seriously contend that a limitation on the expenditure of money to print a newspaper would not deprive the publisher of freedom of the press. Nor can the fact that it costs money to make a speech—whether it be hiring a hall or purchasing time on the air—make the speech any the less an exercise of First Amendment rights."

United States v. *Auto Workers*, 352 U.S. 567, 594 (1957) (dissenting opinion).[5]

Virtually every political communication involves the expenditure of money. Even the paradigm case of the speaker in Hyde Park involves transportation and a soapbox. Demonstrations, see *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), require that people be moved and concentrated in one place. Handbills, see *Talley* v. *California*, 362 U.S. 60 (1960), require a printing press, paper, and some means of distribution. In bad weather, speeches require a hall. Bull horns, pens, pencils, and even picket signs cost money. Similarly, litigation to preserve one's rights can entail substantial expenses. *NAACP* v. *Button*, 371 U.S. 415 (1963).

Virtually every form of political activity thus requires either out-of-pocket expenditures or at least an "opportunity cost" (in economic terms, the foregoing of opportunities to earn money). Volunteers need a paid staff to supervise them and may have to sacrifice income to devote their time to the campaign.

These examples, moreover, involve the less costly and often less efficient means of political communication. Television speeches, direct mailings, transportation, a staff to research issues, consultants, and newspaper advertisements are all essential to effective political communication and involve substantial financial outlays.

It mocks the purpose of the First Amendment to argue that, while such communication cannot be restricted, the un-

[5] Mr. Justice Douglas would have found 18 U.S.C. § 610 (prohibiting corporate and labor-union contributions) unconstitutional; the passage quoted in the text is part of his opinion on that point. The majority did not reach the constitutional question but instead remanded the case for trial.

derlying expenditures can. Under this view, a limitation on how much newspapers spend on publication—to hire reporters, investigate stories, and print editions—would not be a regulation of the newspaper itself. But see *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936). Political activities require the expenditure of resources. Prevent the use of resources and the activities will end. Prevent the use of money to obtain the resources and the same result is obtained.

Expenditures for political communication fall within what this Court has called "pure speech" under the First Amendment, *Edwards* v. *South Carolina*, 372 U.S. 229 (1963). Since protection of such speech is a "major purpose of the amendment," *Mills* v. *Alabama*, 384 U.S. 214, 218 (1966), expenditures for political communication have the same stature as the communication itself. "Liberty of circulating is as essential to [freedom of speech and of the press] as liberty of publishing; indeed, without the circulation, the publication would be of little value." *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938); *accord*, *Talley* v. *California*, 362 U.S. at 64.

Decisions of this Court clearly support these propositions. Not only do they derive from the cases cited above, but *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), directly held that it was "immaterial" for First Amendment purposes that the advertisement there in question had been purchased. *Accord*, *Bigelow* v. *Virginia*, 43 U.S.L.W. 4734 (June 16, 1975). Indeed, one important function of "freedom of the press" is to preserve avenues of citizen communication through the medium of political advertising.

It makes no difference whether the expenditure is on behalf of an issue or on behalf of a candidate. In either case those making the expenditure seek to communicate with the public to promote their views on governmental policy.

The First Amendment does not distinguish between praising unionism in the abstract and inviting people to join a particular union. *Thomas* v. *Collins*, 323 U.S. 516 (1945). Nor does it distinguish between espousing a cause and supporting the political candidates who believe in it.

(2) *Contributions for Political Purposes Are Protected by the First Amendment.*

Contributions for political purposes are a means of espousing political ideas and pursuing political goals. They are not, as the court below suggested (op. at 1517), in any sense the functional equivalent of votes. When put to campaign purposes, contributions enable candidates to communicate their views to the voters who then make a free choice. Contributions thus serve to increase the level of political communication.

The sole argument for distinguishing between expenditures and contributions for similar ends is that, in the case of the contribution, the donor gives up control over the manner in which the money is ultimately expended. So long as contributions are used for campaign purposes, that attempted distinction fails, for the choice between an expenditure and a contribution is one made by donors as to the most efficient means of espousing their political ideas and pursuing their political goals.

At some point in the history of a movement, it may make sense for adherents to spend money acting independently in its support, *e.g.*, newspaper advertisements, bumper stickers. At other times giving to organizations which espouse the underlying ideas but do not endorse or support candidates may seem most sensible. At yet other times it may be more appropriate to give directly to candidates who espouse or symbolize that cause, or to do all these things. The ultimate goal, after all, is to see one's

views become government policy. Electing the right candidates is central to achieving that end.

To restrict donors in their choice of means of expression is directly to limit the articulation of their political goals, the effectiveness of their pursuit of those goals, and their right to associate in combination with others to make that effectiveness greater.

The 1968 presidential campaign of appellant Eugene McCarthy is a paradigm case of why contributions to a candidate are protected by the First Amendment. Individuals who contributed to the McCarthy campaign in order to further the cause of terminating the war in Southeast Asia were able to pool their resources in the most effective way available at that time. If each had been required to act only as a volunteer, or to contribute only to "issue" organizations not supporting a candidate, not only would the McCarthy campaign, which was heavily dependent on campaign money, have been far less successful, see *infra*, p. 135, but all contributors as a result would have been far less able to further the cause in which they believed so strongly. Campaign contributions were thus a means of exercising the freedom of association as well as the freedom of expression.

Similarly, many persons intensely committed to the cause of ending the war made the quite rational decision that only by extending their influence beyond their voting districts would they be able to further that cause effectively. It is too constricted a notion of the political process to suggest that persons ought not to be able to propagate their views effectively to voters in other voting districts. As was the case with the McCarthy New Hampshire primary campaign, events in one district can have an enormous influence on issues affecting all voters, and political freedom is not possible if citizens are not free to attempt to

influence the electoral process wherever it affects them. *Pierce* v. *Kohler*, 163 Wisc. 615, 158 N.W. 696 (1916).

The contribution of money to a candidate, in conjunction with other individuals making similar contributions or contributions of their time and energy, is precisely the sort of associational freedom protected in *NAACP* v. *Alabama*, 357 U.S. 449 (1958), and *Kusper* v. *Pontikes*, 414 U.S. 51 (1973). Unless the First Amendment right of freedom "to petition . . . for a redress of grievances" is to be reduced to a shadow, the rights of individuals to join together to support like-minded candidates with financial contributions must be preserved.

Nor can one distinguish between contributions and other political acts because of any "obligation" that is created. The volunteer lawyer, whose contribution of time is not limited by the statute, and the contributor of money stand on the same footing so far as that is concerned, as do other kinds of protected activities such as a *New York Times* editorial endorsement or favorable coverage by *Time* or *Newsweek*. Indeed, the latter are probably far more valuable, and thereby create a more compelling "obligation," than any contribution received by a candidate. No one would suggest that, because issues affecting the press such as shield laws or postage rates are subject to congressional action, the press may be barred from endorsing a candidate on the ground that it might be pursuing its "special interests."

Of course, those who contribute money to a candidate hope to further their political, social and economic views—just as those who engage in demonstrations and rallies, write books on political issues, organize like-minded citizens, draft and circulate petitions, buy advertisements, publish periodicals or newspapers, make speeches, sponsor seminars or teach-ins, or engage in litigation hope to further their political, social and economic views. Such

activities are the hallmark—as well as the indispensible precondition—of a free society. See *Eastern Railroad Presidents' Conference* v. *Noerr Motor Freight*, 365 U.S. 127, 139 (1961).

These principles have been clearly recognized in the decisions of this Court. In *Bates* v. *City of Little Rock*, 361 U.S. 516 (1960), and *United States* v. *Rumely*, 345 U.S. 41 (1953), this Court recognized that contributions are protected by the First Amendment. In *NAACP v. Alabama*, *supra*, the Court indicated that the individual's right of expression, not the association's, was at stake. The First Amendment applies to financial contributions to political candidates and organizations dealing with public issues. *ACLU* v. *Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom. Staats* v. *ACLU*, 43 U.S.L.W. 5043 (1975); *United States* v. *National Committee for Impeachment*, 469 F.2d 1135 (2d Cir. 1972); *Pollard* v. *Roberts*, 283 F. Supp. 248 (E.D. Ark.), *aff'd per curiam*, 393 U.S. 14 (1968).

(3) *The Permissible Zone of Regulation of Campaign Contributions and Expenditures Is Narrow.*

Although campaign contributions and expenditures are protected by the First Amendment, there is a permissible zone of regulation recognized in the decisions of this Court. That zone is narrow; it is limited to the regulation of non-speech elements or the protection of a governmental interest unrelated to freedom of expression. The Court has held that "when 'speech' and 'non-speech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the non-speech element can justify incidental limitations on First Amendment freedoms." *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968). Where that principle applies, the regulation must be carefully tailored to fit the circumstances which called it into being.

Under this Court's decisions, advocacy which is not likely or intended to incite or produce illegal actions, *Brandenburg* v. *Ohio*, 395 U.S. 444 (1969), peaceful, non-obstructionist demonstrations, *Edwards* v. *South Carolina*, 372 U.S. 229 (1963), and non-disruptive activity such as wearing arm bands, *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), cannot be labeled "non-speech." But where the activity brings about results other than those which stem from persuasion, such as the obstruction of thoroughfares or coercive pressure on a judicial system, see *Cox* v. *Louisiana*, 379 U.S. 536, 379 U.S. 559 (1965), the government may regulate the attendant conduct with narrowly drawn provisions directed at the harm to be eliminated.

Where the money is given on the understanding that specific governmental action will be taken as a result thereof, or as a reward therefor, Congress may regulate the conduct. See *United States* v. *Brewster*, 408 U.S. 501 (1972). Neither persuasion nor the usual exercise of political power is involved. Rather, the official has abandoned freedom of decision. That and the acts inducing it are not protected, because the speech involved is necessarily assimilated into validly regulable activity. See also *Pittsburgh Press Co.* v. *Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973) (aiding the formation of an illegal contract).

The case is different, however, when a campaign expenditure is made in the hope of persuading voters to cast their ballot for a particular candidate, and when, without the *quid pro quo* mentioned above, a contribution is made to a candidate to use in his campaign to communicate with voters. To be sure, those who make such contributions or expenditures hope their interests or views will be advanced by the election of the candidate. What is involved is no more (assuming the politician takes the contribution of expenditure into account at all) than the

kind of political judgment any politician makes as to decisions which affect those who have in the past aided his candidacy (by votes, volunteer work, editorial endorsements, contributions or otherwise) or might do so in the future. It is no more subject to limitation by the state.

The line between these polar cases is the line which regulation of expenditures and contributions must walk; it must be directly and precisely aimed at control of conduct with minimal speech elements while intruding as little as possible on the exercise of associational rights and freedom of speech.

In walking this line, there is no reason to distinguish between groups making expenditures in the hope of electing candidates who will take governmental action favorable to their economic interests and groups whose expenditures appear more ideological. As Mr. Justice Black stated for the Court in *Eastern Railroad Presidents' Conference* v. *Noerr Motor Freight*, 365 U.S. at 139:

> "It is neither unusual nor illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors . . . [T]o disqualify people from taking a public position on matters in which they are financially interested would deprive the government of a valuable source of information and . . . deprive the people of their right to petition in the very instances in which that right may be of the most importance to them."

Because expenditures and contributions for political purposes have the same constitutional stature as political speech, moreover, they may not be regulated because of their content, *Schacht* v. *United States*, 398 U.S. 58 (1970), or because they are too persuasive, *Mills* v. *Alabama*, 384

U.S. 214 (1966), or because access to communication is unequal, *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241 (1974). Neither may they be regulated in the name of the anti-democratic purpose stated in the House Report accompanying this legislation, to protect the electorate from "a sophisticated advertising program." H. Rep. No. 93-1239, 93d Cong., 2d Sess. 3 (1974).

In the present case, the court below made no attempt to isolate the non-speech elements but flatly held that the speech itself could be prohibited by proscribing access to the necessary resources. For every practical purpose it held that the contribution and expenditure of money for campaign purposes are simply not protected by the First Amendment. Indeed, it denigrated political campaigns by labeling them "Romanesque political extravagances," a judgment as to the content and quality of the speech involved. With all due respect, the judiciary's responsibility under the Constitution is to protect speech, not to evaluate it and dismiss it as unworthy of protection. *Police Department of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972).

II.

The Legislation Is Not Responsive to a Demonstrated Need, and Aggravates Rather than Cures the Abuses Asserted as Its Rationale.

A. *The Statute Cannot Be Sustained on the Basis of the Justifications Offered To Support It.*

The challenged legislation has repeatedly been defended in the name of eliminating corruption, reducing inequality, preventing "special interests" from exercising undue influence over government, and preventing another "Watergate." The suggestion repeatedly made is that those who attack the FECA are attacking these goals. The great tragedy, however, is that the legislation as framed is unresponsive to these goals and in some respects actually counterproductive. The most suspect contributions are left untouched, the power of special interests is *increased*, and the danger of a recurrence of an affair such as "Watergate" is enhanced.

The theory upon which the challenged legislation was enacted by Congress and upheld by the Court of Appeals is based on three essential allegations.

First, it is claimed that the costs of political campaigns have "skyrocketed" at an unacceptable rate (op. at 1512). The Senate Report spoke of "the task of halting escalating campaign costs," S. Rep. No. 93-170, 93rd Cong. 1st Sess. 1 (1973), while the House Report declared,

> "Under the present law the impression persists that a candidate can buy an election by simply spending large sums in a campaign . . . . The electorate is entitled to base its judgment on a straightforward presentation of a candidate's qualifications for public office and his programs for the Nation rather than on a sophisticated

advertising program which is encouraged by the infusion of vast amounts of money." H. Rep. No. 93-1239, 93-1239, *supra*, at 3.

The second allegation asserts that traditional methods of campaign financing give the "wealthy few . . . a stronger political voice than the unwealthy many because they are able to give and spend more money . . . " (op. at 1517).

The third allegation is that such financing creates a "link . . . between campaign contributions and preferential treatment by politicians . . . ." *Hearings on S. 372 Before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration*, 93rd Cong., 1st Sess. 149 (1973). The claim is that campaign contributors frequently solicit and receive special governmental action in return for their contributions.

The evidence alleged to support the first two of these three rationales for the legislation fails to demonstrate a compelling need. At best, it is speculative; at worst, it flies in the face of common observation. And while the third rationale, the threat of corruption, reflects concern about a genuine problem, the evidence demonstrating it in no sense calls for *this* particular legislative scheme, which, as demonstrated *infra*, pp. 63-78, leaves the most suspect campaign finance practices entirely untouched while outlawing vast areas of legitimate activity.

It must be emphasized that the FECA is not particularized legislation aimed at specific suspect practices. Rather, it is based on a general condemnation of private campaign financing. This generally negative view of private campaign financing taken by the sponsors of this legislation finds little or no support in the works of scholars who have studied the subject over the last generation. Numerous scholars, while not denying that private financing has some negative aspects, have concluded that it performs countervailing valuable functions. Cole, *Campaign Financing in*

Senate Elections, passim (1975); Alexander, "Links and Contrasts Among American Parties and Party Subsystems," in Heidenheimer ed., *Comparative Political Finance* 103-04 (1970); Adamany, *Financing Politics* 230-33 (1969); Polsby and Wildavsky, *Presidential Elections* 39-40 (1968); Key, *Politics, Parties and Pressure Groups* 495-513 (5th Ed. 1964); Heard, *The Costs of Democracy* 6 (1960); Overacker, *Money in Elections* 5-14 (1932).

Effective disclosure provisions, properly drawn, might well be expected further to illuminate the role private financing plays in elections. Unfortunately, the FECA Amendments came so soon after the first effective disclosure provisions were enacted that additional information on the role of campaign money provided by disclosure was neither assembled nor digested by students of the subject prior to the enactment of the legislation; nor was there time to ascertain fully whether operation of the disclosure provisions themselves would provide an adequate remedy for the perceived ills.

(1) *"Skyrocketing" Costs of Campaigns*

Claims about skyrocketing campaign costs lack perspective. Costs have of course increased over the years. But that increase is comparable to or less than changes in other relevant variables. The rise in campaign costs between 1952 and 1972 (almost 300%) is almost exactly matched by the increase in total expenditures for advertising of commercial products (305% between 1950 and 1972), Findings I, 13, pp. 7-8, App. II-10-11, and by the increase in the Gross National Product (310% between 1952 and 1972), *Id.* I, 90, p. 54; App. II-52.

Absolute costs, moreover, are not so high as some think.[1] In fact, the total 1968 campaign bill was 16 percent

[1] Political spending in the United States is low compared to that of other countries. Findings I, 54, p. 25; App. II-26. Sweden, for example, (continued)

less than the total spent that year on advertising for tobacco products. The total cost of all elections in 1972, $400 million, was less than that spent on advertising by the two largest commercial advertisers, *id.* I, 92. In addition, percentage increases in the federal budget over a comparable period have far outstripped any increase in the costs of elections, *id.* I, 96, p. 56; App. II-53-54.

If the costs of campaigns are skyrocketing, then the financial advantages available to incumbent officeholders are rising at the speed of light. While campaign costs increased 300% between 1952 and 1972, the cost of franked mail increased 600% between *1954* and *1970*, *id.* I, 35, p. 21; App. II-23. The following demonstrates the incredible increase in more recent years:

Cost of the Frank

1966	$7.5 million
1973	23.0 million
1975	38.0 million
1976 (budgeted)	46.1 million

Id. I, 36, p. 21; App. II-23; Wall Street Journal, June 2, 1975, at 5, col. 1.

Of course, use of the frank throughout a Congressman's term benefits him. And since, as all parties have agreed and the District Court found, "the peak mailing periods for use of franked mail are just prior to the dates of primary and general elections" (Findings I, 34, p. 21, App. II-23), it is unrealistic to consider the rise in campaign costs as an independent phenomenon.

[1] (continued)
spends four times as much per capita as the United States, Adamany and Agree, Political Money: A Strategy for Campaign Financing in America 9, 221 (forthcoming this month from Johns Hopkins U. Press).

Increases in other perquisites of incumbency, *id.* I, 24-33, pp. 15-21, App. II-16-23, have increased to match the astonishing pace set by the frank, to the point where Americans for Democratic Action now estimates that an incumbent member of the House seeking re-election has a $976,000 advantage per term over a challenger solely because of these perquisites. *Washington Post*, Aug. 26, 1975, at A3, col. 1. Since the start of 1974 alone, the value of these advantages has increased by 30 percent. *Id.*

The development of new and costly telecommunications technology increases the amounts spent on campaigns but also dramatically increases the numbers of voters reached and the amount of political information they receive. Heard, *supra*, at 403-05.

So too does an increase in the number of primary elections and local caucus meetings increase the cost of politics. Between 1968 and 1972 the number of primaries doubled, and comparable changes in rules governing the selection of delegates in non-primary states also occurred. Findings I, 91, p. 55; App. II-53. We cannot have increased political activity and more widespread participation in the democratic process without increased costs. Alexander, "The Impact of Election Reform Legislation on the Political Party System," 27 (delivered at the 1975 meeting of the American Political Science Association, Sept. 2-5, 1975).

Similarly, the increased incidence of ticket splitting, *id.* I, 38-40, p. 22, App. II-24, forces individual candidates to rely less on party tickets and fading party loyalties and to run and spend more on individual campaigns.

The allegation of "skyrocketing" campaign costs is based entirely on the fact that campaign costs rise more quickly than the Consumer Price Index. However, the parties have agreed and the District Court found that ". . . campaign items tend to be those, historically, whose prices increase faster than the inflation rate, in particular,

items such as wages and other payments for personal services, and advertising costs." Findings II, B 47, p. 202; App. II-581. Not only does this destroy the "skyrocketing" costs argument; it also means that limitations on expenditures linked only to the Consumer Price Index will in real terms become more restrictive as time goes by.

Finally, the Court of Appeals was concerned about the time and energy presidential candidates spend on fund raising under the system of unlimited private financing. For support it relied solely upon two statements made in congressional hearings (op. at 1513), each of which seems exaggerated and self-serving and is nowhere supported in the literature describing political campaigns. Moreover, the effect of the legislation on contribution size makes fund raising far more onerous and time-consuming than before. By the time the court below decided this case, it was abundantly apparent that the effect of the challenged legislation has forced members of Congress with presidential ambitions to curtail their legislative responsibilities in order to engage in full-time fund raising well over a year and a half before the presidential election. Alexander, "The Impact of Election Reform Legislation on the Political Party System," *supra*, at 27; Washington Post, Sept. 15, 1975, at A1, Col 1; Los Angeles Times, Aug. 15, 1975, at I26, col. 1; New York Times, July 21, 1975, at 10, col 3.[2]

It may well be that too little rather than too much is spent on American political campaigns. As two commentators, Adamany and Agree, *supra*, at 27, have written:

[2] In addition, the legislation demands not inconsiderable expenditures of time by candidates and their staffs in attempting even to understand, let alone comply, with its numerous and often ambiguous requirements. Investing massive amounts of time in wrestling with the exactions of a federal bureaucracy may be a poor substitute for contacts with voter-contributors.

> "... we pay only a small sum for competitive campaigns that pose choices of officials, clarify the programs of candidates, and expose the records and qualifications of those seeking to govern. After food, clothing, shelter, and perhaps religious affiliation, what greater necessity is there for citizens in a democracy than the political process by which they select officials and programs?"

Similarly, Herbert Alexander has observed that

> "[p]olitical costs need to be considered in perspective. Considered in the aggregate, politics is not overpriced. It is underfinanced .... The important consideration is not the costs as such, but whether they are essential for a competitive and responsive political system." Hearings on S. 372, *supra*, at 219.

(2) *Inequality of Political Voice*

As for the second rationale—that private campaign financing fosters inequality of political expression as between the rich and the poor—the court below simply assumed that such inequality necessarily means that the views and interests peculiar to the wealthy will receive disporportionate favor (op. at 1513).

This assumption is neither intuitively nor empirically correct. Political newcomers who lack an established political base and high name recognition need large contributions to make a start, a point demonstrated in more detail *infra*, pp. 124-38. Large contributions may also offset other inequalities such as access to the media, the perquisites of incumbent officeholders, and the unfamiliarity of one's cause. See *infra*, pp. 128-31. Recipients of large contributions may be, and often have been, among society's least powerful. See *infra*, pp. 121-24. Merely as one example,

Julian Bond's campaign manager, in ending Bond's presidential candidacy, blamed the challenged legislation for his failure to raise adequate "seed money" to mount an effective campaign. See *infra*, p. 132. As one scholar put it, " . . . the traditional fat cats are *not* all of one species, allied against common adversaries. Big givers show up importantly in both parties and on behalf of many opposing candidates," Heard, *supra*, at 6 (emphasis in original).

Indeed, campaign contributions tend to be less concentrated in a small percentage of the population than other forms of political activity. More people contribute than work actively for a candidate or participate in demonstrations. Findings I, 107, pp. 97-8; App. II-147. The court below relied upon the fact that 1 percent of the people account for 90 percent of political contributions and that 2 to 3 percent of the people are responsible for 95 percent of financing for congressional elections (op. at 1513). In fact these figures demonstrate that contributing to campaigns is one of the most widespread form of political participation and expression today, for 3 percent of the population amounts to well over seven million people. If seven million people participated in ownership and control of the institutional press, the allegations of media concentration found inadequate in *Miami Herald Publishing Co.* v. *Tornillo*, *supra*, to justify inhibitory legislation would never even have been made.

The court below suggests that increased expenditures lead to increased reliance on a small number of large contributors (op. at 1513). There is no support in the record for this assertion. The popular base of campaign contributions has been broadening in recent years, as demonstrated by the increasing proportion of income to national-level committees derived from individual contributions in sums of less than $500 in the presidential years 1948-1968, Findings I, 45, pp. 23-24, App. II-25, and the experience of the 1968 McCarthy campaign and the 1972 McGovern effort. Both of these campaigns, and many others as well, began with

"seed" money from a small number of large contributions, and used that money to amass a large campaign fund from large and small contributors alike, see *infra*, pp. 135-36.

(3) *The "Corruption" Rationale*

This legislation was as much a response to the suspicion of corruption as to the fact itself. John Gardner, speaking on behalf of Common Cause, testified that "[o]ne can rarely nail down the causal relationship between campaign gifts and later political acts, but the pattern of political giving creates a cloud of suspicion that can only deepen the cynicism of the average citizen." Hearings on S. 372, *supra*, at 92. This theme was repeated again and again by supporters of the FECA Amendments.[3]

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[3] Senator Scott, a co-sponsor, said,

"Regardless of the motives of the donor, or the intentions of the recipient candidate, there appears to be an appearance of impropriety. I regret that this is so, because such charges are usually unfounded, but like the proverbial wife of Julius Caesar, we must be above and beyond reproach." *Hearings before the Subcommittee on Privileges and Elections of the Committee on Rules and Administration, on S. 1103, S. 1954, S. 2417, S. 3*, 93d Cong., 1st Sess. 33 (1973).

Senator Abourezk:

"It is really the appearance of corruption that harms us, I think, more than any corruption that does go on, because there are certain controversial amendments up today that I would like to vote for, but because I received contributions from daily farmers around the country, I am almost afraid to vote for them because it is set up now in the press that anybody who does vote for them who has taken money from the dairy farmers has been bought off." *Hearings on S. 23, S. 372 et al.*, before the Subcommittee on Privileges and Elections of the Senate Committee on Rules and Administration, 93d Cong., 1st Sess. 207 (1973).

Senator McGovern:

"[T]hose of us who run for office can profess that the campaign contributions we receive do not in any way control our votes, but I venture to say that not many believe it." 120 *Cong. Rec.* S. 4553 (daily ed. March 27, 1974).

The record demonstrates a limited, though plainly serious, amount of corruption in the sense of proven or suspected *quid pro quo* arrangements involving campaign contributions and government action. At most, the record shows:

(1) A number of illegal corporate contributions which may or may not have involved such *quid pro quos*. Findings I, 109-17, pp. 98-106, App. II-148-53, but which are untouched by the FECA Amendments since they were illegal under prior law. These provide support for the FECA Amendments only in that effective, but narrowly drawn, disclosure provisions (which appellants support) will make such crimes more easily detectable in the future.

(2) A few apparently unsuccessful attempts to influence governmental action, *id.* I, 118, 160, 164, pp. 106, 171-72; App. II-153, 254-55.

(3) Attempts by the milk producers to influence governmental action, *id.* I, 158, 165, pp. 171-73; App. II-254-55.

(4) The conferring of several ambassadorships in arguable or apparent exchange for large contributions, *id.* I, 121-23, pp. 107-08; App. II-154-55.

The record also demonstrates two categories of contributions with a high potential for improper motive: first, contributions made to opposing condidates; second, contributions before April 7, 1972 (the effective date of the disclosure provisions) or so late in the campaign as not to be subject to effective disclosure.

These cases represent only a fraction of total campaign contributions. That the evidence should be so meager is highly significant in light of the fact that it was gathered in the midst of a major political scandal, at a time of unusual public receptivity and interest, when evidence of official corruption was uniquely and unprecedentedly available,

and in the course of a vigorous investigation by an independent special prosecutor. While any substantial level of corruption must be dealt with, the particularized abuses demonstrated are subject to particularized remedies and do not call for wholesale and unnecessary limitations on political communication. Indeed, bans on labor-union and corporate contributions, 18 U.S.C. §§ 610, 611, the source of much that was illegal in the 1972 elections, and attempts at bribery and giving rewards for government action were illegal, *id.*, §§ 201, 597, long before Watergate or the FECA Amendments. The other abuses identified are untouched by this legislation.

There is a serious lack of precision in the charges made about the "corrosive influence" of private campaign financing. Such rhetoric fails to distinguish between *quid pro quo* arrangements and giving to candidates who are already predisposed to the donor's positions on public issues. Thus Sen. Kennedy argued on behalf of the legislation, "is there any doubt that the AMA money will be used in the fall elections to subvert national health insurance and to support candidates who oppose health reform?" 120 *Cong. Rec.* S 5275 (daily ed. April 4, 1975). And the record in this case is thick with detailed lists of campaign contributions by "special interests," Findings I, 101-03, pp. 57-96; App. II-54-146.

The evidence indicates, however, that contributions generally go to candidates already disposed to the donor's point of view, and that ideological lines are usually clearly drawn well in advance of the campaign. Comparing the 25 most expensive House races in 1972 and 1974, Findings II, A 8, and 10, pp. 76-81, 84-87, App. II-422-33, 435-40,—races in which large contributions were of critical importance to the candidates—with the endorsements the candidates received from various political groups with well-defined policy stances, 30 *Cong. Q. Wkly. Rep.* 2967 (Nov. 11, 1972); 32 *Cong. Q. Wkly. Rep.* 3077 (Nov. 9, 1974), confirms the common-

sense proposition that campaign contributions generally flow to those candidates who have clearly defined positions and with whom donors already agree.

Once "corruption" or "corrosive influence" is defined mechanically to embrace all contributions intended to help political allies communicate with the voters, the case against private campaign financing is not hard to make. Coming from a different Senator in 1968, the statement quoted *supra*, p. 65, might have been, "is there any doubt that anti-war money will be used in the fall elections to subvert the war in Southeast Asia and to support candidates who oppose it?"

The court below relied heavily upon the existence of contributions by what it and the appellees label as "special interests" (nowhere defined) to justify the proscriptions of the FECA (op. at 1513-16). However, the vast majority of such "special interest" contributions are small, and in the aggregate constituted no more than 15.7 percent of total contributions to congressional candidates in 1972 and 11.6 percent in 1974. Findings I, 101-03, pp. 57-96, App. II-54-146, and II, A 85-96, pp. 114-120; App. II-460-64. To single out these contributions as unjustifiable because of the views they represent, moreover, comes perilously close to regulating the content of political speech. In any event, the actual impact of the FECA is to strengthen the relative power of these groups to support candidates they favor, see *infra*, pp. 68-72.

Although the sponsors of the FECA Amendments made much of "Watergate" as a demonstration of the evils of campaign financing, the reforms which in fact speak to the break-in and subsequent cover-up (*e.g.*, prohibiting cash contributions in excess of $100, 18 U.S.C. § 615) constitute only a fraction of the legislation and are not challenged by appellants. To the extent that private campaign money financed the affair—in fact, public money financed much

of the cover-up—it was through contributions made prior to effective disclosure requirements. The unraveling was in fact accomplished in large part by tracing these contributions, Findings I, 128, p. 110; App. II-156. Private contributions or campaign expenditures, if subject to properly drawn disclosure requirements, are thus hardly well suited to illegal or covert purposes. If "Watergate" were truly the target of the FECA Amendments, they would have stopped with disclosure and the severe limitation of cash contributions.

B. *The Impact of the Challenged Legislation Will Be To Aggravate Rather Than To Cure the Specified Abuses.*

This legislation cannot be upheld merely upon the repeated intonation of "corruption", "special interests", "inequality", and "Watergate." Scrutiny rather then rhetoric is called for when legislation trenches upon First Amendment rights, and here that scrutiny must be directed to the impact of the FECA on this nation's political life. That impact, aside from the basic impact of severely inhibiting free expression, most assuredly will be to increase the power of "special interests," to increase the power of those who are "in" while decreasing that of those who are "out," and to leave untouched the chances of a recurrence of some of the kinds of incidents which fit under the penumbra of the term "Watergate." The great tragedy of the challenged statutes is that they do not reform those problems which legitimately concerned the court below, but rather aggravate them, and do so by trenching on First Amendment rights.

One effect of the statute will be to reduce competition between candidates, by making it more difficult for challengers to unseat incumbents. As demonstrated more fully *infra*, pp. 87-104, challengers need to spend at relatively high levels to offset the high name recognition of incumbents and their extensive use of their perquisites of office,

e.g., the frank. To become viable, moreover, challengers need "seed money," see *infra*, pp. 130-38, which is made virtually impossible to raise by the limits on contributions.

The FECA simply does *not* limit political contributions and expenditures equally. It limits *all* expenditures by challengers but only *some* expenditures by incumbents. And it limits *all* contributions to challengers but only *some* contributions to incumbents. Incumbent officeholders can by their own vote increase the resources at their disposal in ways which are the equivalent of very large contributions. See *infra*, pp. 130-38. The actual impact of the legislation, therefore, will necessarily make campaigns by challengers less likely to succeed.

Another effect will be to increase the relative power of organized economic interest groups, which the court below believes are already too powerful. Under 18 U.S.C. § 608 (b) (2), a political committee may give up to $5,000 to each candidate. There is no restriction upon the number of such committees which may represent a particular "interest." Any individual may give $25,000 to a single such committee so long as none of it is earmarked for a particular candidate.

Under 18 U.S.C. §§ 610 and 611, moreover, corporations and unions may solicit contributions to "segregated funds" which make contributions to candidates and political committees and may pay for the maintenance and administration of such funds. Unions, business interests, and professional groups need only create several political committees rather than one to continue their past practices, subject only to the "earmarking" limitation and the $25,000 limit on individual contributions.

Thus, while the statute severely limits contributions by ideologically motivated individuals and spontaneously organized committees, it allows the practices of organized interest groups to continue unfettered.

The legislation leaves untouched, for example, the contributions of the dairy industry, which figured largely in the argument of appellees and the opinion of the court below. Every county organization of the dairy producers can have a political committee entitled to give up to $5,000 apiece to an unlimited number of candidates. In effect, *dairy interests can give unlimited amounts to a candidate, can contribute to opposing candidates and can time these contributions to avoid effective disclosure.* And what is true of dairy interests is true of all organized economic interest groups.

The lack of even a whisper of protest from such groups is surely significant. As one commentator has stated:

> "Special interest groups such as labor union, business, education, health and dairy political-action committees are relatively unaffected by the new contribution limits. The reason is that they have strong local bases and can funnel their contributions through state and local affiliates, thus making smaller multiple contributions instead of one large contribution to their favorite candidates.
>
> "It is ironic and instructive that labor, one of the groups the law would be expected to check, had no complaints with the $5,000 contribution limit on political committees. Neal Gregory, former co-director of the Center for Public Financing that lobbied for the law's passage, has reported that the $5,000 limit was checked with the AFL-CIO before it was put in the bill. 'There was no opposition to it,' he said." Freed, "How to Sneak Around the New Campaign-Reform Law," Baltimore Sun, Aug. 17, 1975, at K3, col. 1.

When this legislation was enacted, the National Association of Manufacturers distributed a brochure

describing the opportunities for corporate interests under the FECA Amendments. The following letter, from the President of the NAM, accompanied the brochure:

"April 10, 1975

"NAM

"Dear Businessman:

"In October, 1974 Congress made some important changes in the law which governs the permissible political activity of corporations. Now, *whether your firm is a government contractor or not*, you may establish a political committee—usually called a separate segregated fund—within your plant or office; *you may solicit voluntary employee contributions to this fund; company officers may serve as fund managers and some or all of the money collected may be distributed by the managers of the fund to political candidates and committees; and company dollars used to administer the fund are not considered a political expenditure.*

"Congress has created a legitimate means for corporations to offer employees a meaningful way *to mass their voluntary political contributions and direct them with multiplied effect toward deserving candidates who understand the problems of their company, the business community and the nation.* While other parts of the new campaign finance law may be viewed as being restrictive, the changes regarding separate segregated funds provide an opportunity for legal and effective expressions of political support and *open up new sources of campaign funds for business-oriented candidates.*

"Therefore, the NAM is urging its members to establish voluntary company-sponsored political fund raising programs (in addition to other voter registration campaigns, candidate visits, and citizenship programs). This manual is offered as a guide for use by company officials. . . . We hope that you will use this manual to provide much needed help to business-oriented candidates in the coming elections.

"Sincerely,
/s/
E.D. Kenna"

(Emphasis added.)

It has already been reported that "[t]he predicted upsurge in corporate political activity has begun . . . . Twenty apparently new political committees have been formed by companies seeking to take advantage of the clarification of section 610, prohibiting corporate campaign gifts except through a separate, segregated fund." 2 Campaign Practices Rep. No. 3 (Aug. 25, 1975), at 3. See also Walters, "New Wrinkles in Corporate Fund Raising," National Journal Reports (Sept. 6, 1975), 1283.

The 20-state matching grant requirement for federal subsidization of primary expenses under Subtitle H, see *infra*, pp. 165-68, also increases the leverage of organized interests with state or local affilitates. Not only can they make sizeable contributions but they can be of enormous aid in helping a candidate become eligible for matching grants.

Notwithstanding all the drumbeating about eliminating the "lavish contributions" by "special interests," the legislation in fact increases their relative power. It does not in any sense respond to the specified abuses. It does nothing to limit the size of "special interest" contributions, nothing to prevent contributions by such interests to op-

posing candidates, nothing to control contributions made too late to be subject to effective disclosure, and nothing to curb the ability of winners, even after victory at the polls, to seek contributions for purposes other than campaigning. See *infra*, p. 77.

The FECA thus avoids and indeed frustrates remedies for the very problems which the court below believed to be the worst abuses of private financing. While the McCarthy campaign of 1968 would have died before the New Hampshire primary had the FECA been in effect, see *infra*, pp. 97, 135, the contributions of the dairy industry in 1972 would have been unaffected.

Beyond that, the FECA subjects the political communication of candidates and their supporters to the discretionary judgment of a regulatory agency staffed by appointees of the President and the congressional party leadership. Question after question will come before the FEC calling upon it to decide how much speech particular candidates or groups may engage in. Myriad decisions by the FEC, down to the choice of which campaigns to audit,[4]

[4] The House Subcommittee on Elections, following hearings, recently recommended that the Commission's authorization be cut almost in half on a yearly basis. Representative Wayne Hays, a member of the subcommittee and Chairman of the House Administration Committee, participated actively in the hearings:

"*Wayne Hays:* During the hearings, Chairman Hays made it clear to all six commissioners that he intended to make the commission toe the line—his line—when it came to money, staffing, and regulations.

"'You're not going to set the ground rules,' Hays angrily told Curtis at one point. 'The committee is. As chairman, I'll tell you. You're coming back every year for an authorization.'

"'Are you coming to my district without a complaint to audit me?' Hays queried Curtis in attempt to determine whether the Commission intended to initiate investigations. It was possible, Curtis said.

(Continued)

will have direct effects on the outcome of elections. Particularly at a time when many are concerned about the "capture" of the regulatory agencies by the regulated groups, subjecting political communication to a similar process—indeed to the discretion of an agency already "captured" by incumbents under the explicit terms of the legislation establishing it—risks our basic freedoms.

In no sense are the challenged provisions a genuine reform emerging from Watergate.[5] They do nothing to prevent the criminal acts that occurred in that affair. As for the 1972 election itself, they would not have impaired the Nixon campaign, which could easily have relied, even more than it did, on the perquisites and the visibility of sitting Presidents. His opponent, Sen. McGovern, however, would have lost, between the beginning of his campaign and three days after the New Hampshire primary, $636,811 in campaign contributions made illegal by the FECA Amendments, and in all probability his campaign would have collapsed. See *infra*, pp. 135-36.

To the extent, therefore, that Watergate involved abuses of presidential power, the FECA is counterproductive. It increases the ability of incumbent Presidents to win re-election, gives them some control over the distribution of matching grant primary money to potential opponents, and, by centralizing control over political com-

[4] (Continued)

"'If you're getting your authorization from my committee, you won't,' Hays retorted."

1 Campaign Practices Reports No. 22, pp. 2-3 (May 19, 1975).

[5] The FECA Amendments *retroactively reduce* the statute of limitations for campaign practices' violations relating to campaign contributions from five years to three years. 2 U.S.C. § 455(a). Any such crime which occurred before today's date in 1972 can no longer be prosecuted, as it could be if prior law remained in effect.

munication in the discretion of a regulatory agency, risks far more serious scandals than those of 1973. Those who are concerned by recent revelations of the abuse of governmental agencies such as the Internal Revenue Service for political purposes can only be appalled at the potential for abuse of the Federal Election Commission.

The tide of informed commentary has turned against this legislation as time has permitted careful scrutiny of its actual impact on American politics. Commentator after commentator,[6] as well as the American Bar Association[7]

[6] Although the following list of citations may be somewhat unusual, the views of experienced political commentators merit consideration in the circumstances of this litigation. See, *e.g.*, Broder, "The GOP's Financial 'Loophole,' " Washington Post, Sept. 14, 1975, at B 6, col. 3; Freed, "How to Sneak Around the New Campaign-Reform Law," Baltimore Sun, Aug. 17, 1975, at K 3, col. 1; Broder, "Campaign Funding Sermon," Washington Post, Aug. 24, 1975, at B 6, col. 5; Broder, "Campaign Spending Limits," Washington Post, July 27, 1975, at C 6, col. 5; von Hoffman, "Bread and Circuses," Washington Post, Aug. 1, 1975, at D 1, col. 1; Matt Reese, F. Clifton White, and Robert Thomson (campaign consultants), in Dickenson, "Political Consultants See Trouble in New Campaign Finance Law," Washington Star, July 31, 1975, at A 1, col. 1; Paul R. Hearle and Charles T. Manatt (Republican and Democratic California State Chairmen, respectively), Los Angeles Times, July 30, 1975, at I-3, col. 7; Freedman, "Imagine This," New York Times, June 30, 1975, at C 29, col. 1; Roche, "Reforms Require Reforming," Advance, June 24, 1975; Lofton, "Candidate Spending Laws," Oceanside Blade Tribune, June 30, 1975; Newfield, "The Permanent Incumbent Act," The Village Voice, May 19, 1975, at 12, col. 1; Lydon, "Political Fundraising Is Now Up To Accountants and the Mail," New York Times, April 20, 1975, at E 5, col. 1; Witcover, "New Law May Hurt Longshot Candidates' Fund-Raising," Washington Post, April 13, 1975, at A 4, col. 1; Goldfarb, "A Wrinkle in the Campaign Law," Washington Post, Jan. 27, 1975, at A 18, col 3; Dillin, "Reform Law Pinches U.S. Candidates," The Christian Science Monitor, Jan. 24, 1975, at 1, col. 4; Alexander, "The Panic To Reform," Newsweek, Jan. 20, 1975, at 84; Will, "The Limits of Campaign Spending Limitations," Washington Post, Jan. 14, 1975, at A 15,

(Footnote 7 appears on next page)

and the American Civil Liberties Union,[8] have noted its impact on free political competition or condemned its intrusion on political freedoms.

C. *Less Intrusive and More Effective Means Were Available to Congress.*

The "less intrusive means" doctrine is usually invoked in circumstances in which this Court must balance losses in the efficiency of regulation of unprotected conduct against attendant gains in the protection of speech. In the present case, no such balancing is necessary, for the least intrusive means are actually far more efficient regulations of the

col. 1; Kilpatrick, "Campaign-Law Challenge," Washington Star-News, Dec. 27, 1974, at A 6, col. 1; Alsop, "The Effects of Campaign Finance Reform," Washington Post, Nov. 25, 1974, at A 21, col. 1.

Space forbids quotation of but a few representative comments. David Broder wrote that "[i]n its haste to pass some kind of reform bill, Congress has unleashed an unguided missile against the American political system. . . this law we have on the books begins to look like a menace." Broder, *supra*, April 30, 1975, at A 17, col. 6. One commentator has noted that ". . . bribes will continue to pass and influence will still be peddled, despite the naive expectation that the bad guys will dutifully line up and file their reports along with the rest of us. At the same time, however, in the dubious name of 'election campaign reform,' we have managed to make a monkey out of the idea of free and democratic elections," Freedman, *supra*. Another said, ". . . what occurred was that Congress, in its laudable rush to purify politics, may have anesthetized it," Roche, *supra*.

[7] The American Bar Association Special Committee on Election Reform recently issued its Report (hereafter cited as "ABA Report"), in substantial measure adopting appellants' views.

[8] The American Civil Liberties Union's recently issued "Questions and Answers About Campaign Finances" (hereafter cited as "ACLU Report") argues on constitutional grounds against every challenged provision of the statutes.

abuses relating to the potential for corruption identified by appellees and the court below.[9]

There is a class of cases in which the involvement of non-speech elements seems particularly high and which are not adequately covered by bribery and similar statutes.

For example, prior to the passage of this so-called "reform" legislation, government contractors were barred from making any direct or indirect contribution to candidates for federal office. Now, 18 U.S.C. § 611 has been clarified so that such contractors *may* facilitate and support contributions from their employees so long as they establish "separate, segregated funds." *Id.* Before its "reform," this section was carefully directed at situations rife with conflicts of interest and the danger of corruption, *cf. Civil Service Commission* v. *Letter Carriers*, 413 U.S. 548 (1973). Thus the challenged legislation *eliminates* a precise remedy that already existed for a precise problem.

The appointment of large contributors to high office involves the danger of *quid pro quo* arrangements which can be avoided by precise measures. Many such officers, including ambassadors, are presently subject to Senate confirmation; carefully drawn disclosure provisions would provide the Senate with the facts it needs to determine whether appointments have been improperly influenced. As to offices not presently subject to confirmation, Congress could require that any potential appointee who contributed in excess of a certain amount to the President's campaign, or the campaigns of his party's candidates, must be confirmed by the Senate. This would enable the Senate to scrutinize on a case-by-case basis whether or not the appointment was based on merit or on campaign contributions. Congress could go further if it wished, and prohibit *any* appointment of contributors of more than a specified amount.

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[9] For additional discussions of the application of the "less intrusive means" test, see *infra*, pp. 151-52, 163, 184, 188-89.

Another category may be the contributing of funds to opposing candidates. Absent special circumstances, the protected speech elements in helping to persuade voters to choose *all* of several alternatives seem low. A law directed at such practices, if carefully drafted, would be less intrusive than the present law, which encourages such multiple giving. 33 *Cong. Q. Wkly Rep.* 1961, 1962 (Sept. 13, 1975).

Late contributions, above a certain size, may be timed to avoid effective disclosure prior to the election. A law which either limited such late contributions or required instantaneous disclosure to permit the timely informing of the voters would be directed at a particular evil.

Congress clearly would have the power to require that contributions be actually spent on campaigns and thus not be of value for purposes other than persuading voters, *i.e.*, for non-speech purposes. For when contributions can be put to virtually unlimited uses, the danger of improper conduct is clearly high, as is the temptation to raise money not needed for political communication. The FECA, however, not only fails to deter this abuse but actively encourages it. See 2 U.S.C. § 439a.

Finally, disclosure of contributions large enough to attract a candidate's attention is the least intrusive regulation and, even more importantly, the most democratic. Whether a contribution is too large or in furtherance of a bad special interest rather than a good common cause is better decided in every case by the voters than by wholesale legislative fiat. Similarly, if a candidate is failing to address substantial issues but merely putting on "Romanesque . . . extravagances" (op. at 1581), the electoral process provides a direct, effective, democratic remedy.

The Court of Appeals asserts that the events of 1972, *id.*, and the failure of earlier disclosure statutes, *id.* at 1592-93, demonstrate that disclosure is inadequate. With regard to the failures of disclosure statutes prior to the 1971 Act, appellants in no way contest the conclusion that they were

both ineffective and inadequately enforced. Indeed, they believe that, but for the problems discussed *infra*, pp. 170-92, the 1971 disclosure requirements of the FEC are a much-needed reform in this area. But the Court of Appeals ignores the fact that the 1971 FECA, which went into effect in the middle of the 1972 campaign and was amended by the FECA Amendments prior to the 1974 election, was not even tested for one full campaign period. The Court of Appeals' reference to "the failure of piecemeal regulation to preserve the integrity of federal elections" (op. at 1593) is unpersuasive in view of Congress' failure to give the 1971 disclosure provisions a reasonable chance and to assess the need for still further legislation in the light of the effects of those provisions.

The record as to 1972, indeed, strongly indicates that disclosure is an effective remedy. The rush to beat the April 7, 1972 effective date of the disclosure provisions, and the prosecutions and exposures effected in the aftermath of the 1972 elections, Findings I, 126-27, p. 110, App. II-156, demonstrate the salutary impact disclosure must have. These events demonstrate not that disclosure is ineffective, but that the political liability it can impose is swift and complete, as is the concern rational politicians must give to the sources of their campaign money in the future.

Justified by rhetoric invoking the spectre of "special interests," "corruption," "inequality," and "Watergate," this legislation itself increases the very dangers those words symbolize. Attention to what the challenged provisions actually say and what they actually do, as well as to the far more effective and far more democratic remedies which were and are available, demonstrates that beyond question. If society is presently afflicted with alienation and mistrust, this legislation is a nostrum which, even if it briefly restored confidence at the price of freedom, would result in quick measure in the revival of an overwhelming — and quite justified — cynicism.

III.

The FECA Limitations on Campaign Expenditures by Political Candidates, Parties, and Committees Violate the Constitution.

A. *Limitations on Campaign Expenditures by Political Candidates, Parties or Committees Are Unconstitutional Per Se.*

The FECA's expenditure limits, 18 U.S.C. § 608(c), are a direct abridgement of the rights of speech and association. The speech which they abridge is that most central to the objectives and essence of the First Amendment and of any democratic society—political discussion by candidates. Speech in the political arena may be unheard unless widely and effectively distributed. To limit the expenditure of money, therefore, is to limit the speech itself. The abridgement challenged here is so fundamental that how the Framers would have regarded it is beyond question. It is palpably unconstitutional.

A single example will illustrate the point. Consider the dilemma of the candidate for federal office running in a district in which the only newspaper is implacably opposed to his candidacy and at every opportunity praises his opponent. What coverage the candidate gets is sparse and negative. Other media are for the most part either located in other districts or find a substantial audience in them. They give some coverage to his campaign and that of his opponent, but cannot afford too much in view of the interests of their audience as a whole. The candidate wants to purchase advertising, but the newspaper declines to accept it or places it on undesirable pages. Media time is very expensive relative to the number of local voters reached, since the candidate must in effect pay to reach a large audience outside the district. If he purchases any substantial amount of media time, in fact, the expenditure limits will force him to lay off his staff. He will no longer be able to

hold events to recruit volunteers and will otherwise have to restrict campaign activities, such as mailings, etc.

This is not an unrealistic hypothetical. Indeed, the nation's first presidential primary is held in a similar place. The hypothetical does not include such other likely facts as the opponent's being an incumbent with high name recognition who has made extravagant use of the frank, and who takes full advantage of his ability to generate media coverage. What it does make clear, however, is that candidate expenditure limitations cannot help but have a baleful influence on that speech which is at the core of freedom of expression.

Political campaigns provide competition central to the democratic process, Findings I, 6-7, p. 5; App. II-8. If political candidates are not to be protected in their run for office, protecting the angry acts of individuals, *Street* v. *New York*, 394 U.S. 576 (1969), cannot save freedom of expression.

The Report on the House predecessor of the FECA Amendments defended limits on candidate expenditures so the public would not be deceived by a "sophisticated advertising campaign." See pp. 55-56, *supra*. As the floor manager of the FECA Amendments, Sen. Cannon, declared, limiting the amount a candidate can spend "certainly is going to limit the amount of persuasiveness one can put forward to the public." 120 *Cong. Rec.* S 18535 (daily ed. October 8, 1974). The issue of free discussion of governmental affairs is thus squarely posed. Congress lacks the power to say when a candidate for federal office has had "too much" communication with the voters or to dictate to such candidates the strategic timing or the means by which that communication is to take place.

Political candidacies rely on the consumption of resources and the expenditure of money. Even an activity like a candidate "walk" requires advance men to invite news personnel and general citizens to meet the candidate and

the ability to provide news outlets with tape, film, pictures and press releases along the way. Cole, *Campaign Spending in Senate Elections* 159 (1975).

The Court of Appeals suggested that the limitations on contributions and expenditures are harmless because they are evenhanded: the same limits apply to everyone (op. at 1518). This is surely a novel view of freedom. Until now, no one had thought that the right to speak could be erased so long as everyone else's rights were extinguished at the same time. Indeed, the suggestion is that the First Amendment is satisfied only if the deprivation is massive enough. In a free society individual rights are protected so the public will be exposed to a robust and uninhibited debate about political matters, free of governmental regulation, no matter how reasonable or evenhandedly that regulation may be thought to affect that debate. That is the teaching of both *Miami Herald* v. *Tornillo* and *Mills* v. *Alabama*, *supra*, where this Court held that statutes which were evenhanded and might reasonably be said to equalize the opportunity to influence voters, were invalid because they lowered the level of political communication. The difference between the FECA and the legislation in those cases is that the FECA attempts the same result in a massive, indiscriminate fashion whereas the others were more narrowly focused.

In any event, the FECA's evenhandedness is illusory, for its operation inevitably works great discrimination against certain candidates and certain causes. Candidates and political movements do not begin from positions of equality. The amount a candidate needs to spend to wage a viable campaign will turn on a wide variety of factors. As a result, no limits on spending can ever be functionally evenhanded. For example, a candidate with low name recognition or poor press coverage running against a well-known opponent can increase name recognition only through his own campaign. How much or how little the opponent spends is far less important to him than how much he can

spend. Cole dep. tr. 378; Crane dep. tr. 14-20; Mahoney dep. tr. 59-63; Wertheimer dep. tr. 50-51, 53-54.

Public concerns at the beginning of a campaign, moreover, will necessarily affect the relative position of the candidates. Some messages will require more spending than others to get across. Thus, in the 1972 Michigan Senate campaign between State Attorney General Kelley and Sen. Griffin, key Kelley campaign personnel believed they could not divert the voters from the busing issue, on which Kelley was weak, to economic issues, on which he was thought to be strong, without spending considerable sums of money. Findings II, B 12, p. 194; App. II-575. That strategy depended on what one side could spend without regard to the actions of the opponent.

Campaign activity and debate will be reduced by expenditure limits, and, as a result, the public will have less information about issues of public importance at precisely the time when such information is most crucial and voter interest is at its peak. *Id.* II, B 57, p. 204; App. II-583. Not only will campaigns provide less information, but a decrease in campaign activity will likely reduce the extent of media coverage. *Id.* II, B 57-59 pp. 204-05; App. II-583. A limit on expenditures will also reduce citizen participation in political campaigns. It costs money to recruit and supervise volunteers effectively, *id.* II, B 15, 39, pp. 195, 200, App. II-576, 580, and a spending limit will tempt campaigns to put more of their resources into television spots and the like than into participatory activities, a result infringing on the associational activities of a candidate's supporters.

If Congress can limit candidate expenditures, there is no kind of political advocacy that it cannot limit. If it can set a maximum on the amount of political communication in which a candidate can engage, then it can put a maximum on the number of people who engage in a demonstration, see *Edwards* v. *South Carolina*, *supra*, or on the

number of handbills which may be distributed. See *Talley* v. *California*, *supra*. Indeed, this very statute moves radically in that direction, for it prohibits independent expenditures in excess of $1,000 "relative to" a candidate, a limit which would affect a distributor of handbills or the organizers of a demonstration.[1]

The expenditure limit itself creates pressure for further regulation. To the extent that candidates are unable to communicate with voters in ways they regard as adequate, they will feel more and more dependent upon the media for exposure. To the extent that such dependence grows so too will complaints of unfairness, see Findings II, B 58, p. 204, App. II-583, and Statement of Jim McClellan, Hearings on S. 372, *supra*, at 252-56, and demands for more and more regulation of the media. If politics is to become a regulated industry, regulation of the media is inevitable. The only way to preserve the values identified in *Miami Herald* v. *Tornillo*, *supra*, *Mills* v. *Alabama*, *supra*, and *Columbia Broadcasting System* v. *Democratic National Committee*, *supra*, is to leave candidates free to communicate with voters in the ways they believe best.[2]

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[1] The ABA Special Committee on Election Reform opposes expenditure limits of any kind. ABA Report at 5. The ACLU agrees that there should be no limits on candidate expenditures:

> "Our interest in eliminating corruption should not make us reduce discussion of public affairs. That is the inevitable consequence of limits on expenditures . . . . Limitations on expenditures by candidates directly restrict their right to speak to the electorate and the public. If candidates are limited in what they spend, they will generate less campaign activity, which in turn will mean less press interest and reporting and, thereby, less information to the electorate." ACLU Report at 18-19.

[2] Although since United States v. Classic, 313 U.S. 299 (1941), federal power to regulate primary elections has not been disputed, there

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This danger is underlined by the fact that the drafters of the FECA Amendments thought it was necessary in effect to bar the owners of newspapers from running for federal office by including within the definition of *expenditure* news stories, commentaries, and editorials in a paper owned by a candidate. 18 U.S.C. §591(f)(4)(A).

One feature of the FECA which has a uniquely radical effect on American presidential politics is the limitation on how much money a presidential aspirant may spend in any one state in both primary and general elections. The FECA prohibits spending more than twice the applicable Senate limits in any particular state. It is one thing to place total limits on expenditures by presidential hopefuls; it is quite another to mandate how and where those expenditures may be made.

This limitation is tantamount to controlling the strategy of presidential campaigns and thus the content of what the presidential candidate is trying to communicate to his party and to the public. Presidential primaries in particular states may serve crucial functions to a candidate's campaign, well beyond the voting strength or population of that state. One example will suffice. The turning point of John F. Kennedy's quest for the Presidency was his defeat of Hubert Humphrey in the 1960 West Virginia presidential primary, which enabled Kennedy to rebut the claim that a Roman Catholic could not win in a Protestant state.

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[2] (continued)
is still much to be said for maximizing a party's autonomy when its adherents choose their candidates. To the extent that expenditure and contribution limits and federal financing in presidential nominating contests interfere with this autonomy, they may well upset or distort the shifting and often fragile coalitions which comprise at least the two major parties. This risk imposed by the challenged statutes ought not to be ignored. *Cf.* Cousins v. Wigoda, 419 U.S. 477 (1975).

Had the FECA been in effect in 1960, John Kennedy would likely not have been elected President.[3]

The limitation on presidential-candidate spending in any one state in the general election may have equally profound and unwarranted effects on national politics. In a close presidential election, where the outcome may depend on the result in one or two major states, and one of the two major party candidates comes from that state, his opponent will be severely handicapped in his ability to overcome that enormous advantage. The result of the statute's restrictions may be to dictate which candidate will be elected President. No governmental interest can sustain that result.

What is true of candidates is also true of political parties and committees. Limitations on the amounts spent by these organizations also violate the First Amendment. To the extent that national conventions are a means of communicating with the public as well as of nominating candidates, any provision limiting the amount that can be spent on conventions falls within the reasoning above. *Cf. Cousins* v. *Wigoda*, 419 U.S. 477 (1975).

The highest courts of two states have recently considered expenditure limitations, and in both cases the challenged statutes were stricken down, *Deras* v. *Myers*, 535 P.2d 541 (Ore. 1975); *Bare* v. *Gorton*, 526 P.2d 379 (Wash. 1974). The *Deras* court explicitly rejected the argument that Watergate-related evils justified the Oregon state expenditure limits, stating "[w]e fail to see how these evils are relevant to the need for controlling campaign expenditures," 535 P.2d at 546. The court concluded that:

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[3] Appellant Eugene McCarthy's campaign in the 1968 New Hampshire presidential primary and George McGovern's victory in the 1972 California primary provide similar examples.

> "... the limiting legislation closes or impedes important channels of communication on public issues and thus denies citizens freedom of expression where the protection of that constitutional right is the most necessary to preserve our system of government." *Id.* at 548.

We submit that the same conclusion here is inescapable.

B. *There is No Compelling Governmental Interest Justifying Limitations on Expenditures.*

Two alleged governmental interests have been advanced to justify expenditure limitations: (1) the need to reduce the "skyrocketing" cost of elections and (2) the need to eliminate the allegedly corrupting reliance of candidates on private financing. See pp. 55-57, *supra.*

As demonstrated *supra,* pp. 57-61, the "skyrocketing" costs rationale is simply contrary to fact. Even if it were not, the idea that "too much" is being spent on elections is an impermissible rationale. It reflects a mistrust of the voter's capacity to evaluate what the House Report called "sophisticated advertising campaign[s]." H.R. Rep. No. 93-1239, *supra* at 3. There are few means of persuasion which might not be deemed somehow too persuasive or somehow likely to fool the public. Moreover, the House Report itself states only that "under present law the *impression persists* that a candidate can buy an election by simply spending large sums in a campaign . . . ." *Id.* (emphasis added). "Impressions" are not sufficient to justify infringements on First Amendment rights.

The rationale of the court below — that limitations on expenditures are necessary to reduce the incentive to violate contribution limits (op. at 1538) — justifies a massive in-

trusion on political communication on thin and unpersuasive grounds. Marginal gains in enforcement authority do not outweigh pervasive restraints on freedom of expression. The statute, moreover, does not limit expenditures only by candidates who have received large contributions. It limits expenditures by all candidates, no matter how small the contributions he receives.

In any event, limits on expenditures will on the whole reduce candidate interest in small contributions. Because small contributions cost proportionately more to raise than large contributions, Findings II, B 41, pp. 200-01, App. II-580, Cole dep. tr. 384-86, a limit on expenditures, including expenditures for fund raising, will induce candidates to raise as much as possible in contributions as large as the law allows, thus reducing the costs of fund raising.

The FECA, moreover, permits candidates to use excess funds in ways which will induce them to raise as much money as they can regardless of limits on expenditures. An incumbent is able to use excess campaign funds to defray office expenses, 2 U.S.C. §439a, or for "any lawful purpose," *id.*, which apparently includes personal use—an ironic reform to emerge from Watergate and the Agnew affair. Such funds can also be put aside to use as seed money for a reelection effort, thus increasing the advantages of incumbency and making the candidate independent of the public for financial support in the next election. The FECA Amendments thus in no way discourage candidates from raising large amounts of money.

C. *The Limitations on Expenditures Are Generally So Low as To Lack a Rational Basis, Are Impermissibly Overbroad, and Have More Than an Incidental Effect on Speech.*

The particular limitations on candidate expenditures embodied in the FECA lack a rational basis, unless they were deliberately intended to be so low as to disadvantage

challengers. See *infra*, pp. 94-104. They do not take into account variables such as incumbent use of perquisites of office or the local cost of media time. They are, moreover, far below the level of expenditures in closely contested campaigns[4] and will thus have a substantial impact on political communication.

The effect of the limits will be "marginal" or "incidental" on political communication only in contests for "safe" seats. It will be drastic, on the other hand, on races for truly contested seats, that is, on those races which in fact are crucial to a genuinely competitive electoral system. The FECA will thus affect not only the nature of fund

[4] As a political rule of thumb, a "closely contested election" is any race where the winner receives less than 55 percent of the total vote. Those Senate seats or House districts where the winner does receive more than 55 percent of the vote are typically labelled "safe" seats. Conversely, the Senate seats or House districts where the winner receives less than 55 percent of the vote are typically labelled "swing" or "marginal" seats.

This assumption may understate the opposition in general elections since a few losers receiving less than 45 percent may have been realistically regarded as serious. On the other hand, the assumption overstates the opposition in primaries without runoffs, since a 51-percent victor over ten opponents may well have been a sure winner.

"Open" seats appear where the previous incumbent is elected to another office, retires or dies. A seat previously considered safe may become a swing seat when the previous incumbent leaves. The out-of-power party may perceive that its chances have considerably increased when the party holding the seat may no longer run the well-known and popular incumbent. In such a case, both parties may well regard the seat as having become marginal. When a particular party has a firm hold on a particular seat, however, even the departure of the previous incumbent may still not be enough to move the seat from the "safe" to the "swing" category.

As a matter of practical politics, the two major parties concentrate heavily on swing seats, attempting to hold those won in the previous election (and if possible increase the margin of victory), and attempting to unseat the incumbent in swing seats held by the other party.

raising but also will dramatically restrict political communication in the most crucial electoral contests.

The different statistics available in the record, and the assumptions underlying them, are explained in Appendix A hereto. Table 1 on p. 90 clearly demonstrates that in 1972 and 1974 large numbers of candidates for the House of Representatives exceeded the expenditure limits. The same conclusion obtains in Senate races. In 1972, on the basis of estimates for general-election expenditures (see Appendix A, pp. A-2 - A-4, *infra*), 33 Senate candidates exceeded the expenditure limits, Findings II, B 19, p. 196; App. II-577. (If inflation between 1972 and 1974 were considered, this figure would be even higher.)[5] In fact, ***the expenditure limits would have eliminated one-third of total spending for the Senate in 1972.*** *Id.* II, B 20, p. 196; App. II-577. Even taking the "combined overall expenditure limit" — primary limits plus general-election limits — and using Common Cause figures unadjusted for inflation, 18 Senate candidates exceeded this limit in 1972, Findings II, A 47, pp. 99-100, App. II-450, and 17 exceeded it in 1974, *id.* II, A 28, p. 93; App. II-445.

Using this "combined overall expenditure limit" minimizes the impact of the legislation, for the reasons shown at pp. A-1-A-5, *infra*. For example, while it may be justifiable in Table 1 to measure the spending of those candidates who had serious challengers in both primary and general elections against the "combined overall expenditure limit," the opposite is the case for those candidates who had serious opposition in no more than one election. In those cases, the overwhelming bulk of expenditures can safely be assumed to have been made in only one election. Thus, the most valid measure is the $70,000

[5] To determine the exact number, the expenditure limit for each Senate seat would have to be calculated on the basis of 1972 population figures. This exercise has not been undertaken.

single-election limit — or, at most, the $84,000 limit including the fund-raising allowance, though that allowance would probably be eaten up by the added cost of raising small contributions.

TABLE I

Table of 1972 and 1974 House Races Comparing Reported Candidate Expenditures (Common Cause Figures)[1] with the Numbers of Candidates Making Such Expenditures

Reported Expenditure Level[4]	Number of Candidates	Number of Candidates with Serious Opposition[3] in Both Primary and General Elections	Number of Candidates	Candidates with Serious Opposition[3] in Both Primary and General Elections
	1972[2]		1974	
$ 70,000 +	245	43	247	47
$ 84,000 +	183	40	187	39
$140,000 +	64	18	53	11
$168,000 +	44	16	22	4

[1] See Appendix A, pp. A-1, A-3-A-4, *infra*.

[2] The 1972 expenditure figures are adjusted upward by 18 percent to reflect inflation between 1972 and 1974.

[3] "Serious Opposition" is defined to mean a race where the winner received less than 55 percent of the total votes cast.

[4] The figures in this column are derived as follows: $70,000 represents the statutory expenditure limit in a primary or general election, 18 U.S.C. § 608(c)(1)(E); $84,000 represents the amount just stated plus the 20 percent fund-raising allowance, *id.*, § 591(f)(4)(H); $140,000 represents the $70,000 figure doubled; and $168,000 represents the $84,000 doubled (the "combined overall expenditure limit," see Appendix A, pp. A-3-A-4, *infra*).

It is also clear that, as Table 2 on p. 91 demonstrates, the "high" spending occurs in the most competitive races, races which are truly contested.

TABLE 2

Table of Reported Candidate Expenditures (Common Cause Figures)* Comparing Average Expenditures by Candidates with General Election Outcome

House Races

% of general-election vote received by winner	1972 Number of races	1972 Average expenditure of winner (adjusted for inflation)	1972 Average expenditure of loser (adjusted for inflation)	1974 Number of races	1974 Average expenditure of winner	1974 Average expenditure of loser
70-90%	97	$ 45,700	$ 8,813	104	$ 43,693	$ 9,051
65-70%	66	49,810	18,951	43	52,272	22,437
60-65%	91	64,977	35,970	51	67,153	36,540
55-60%	60	86,867	64,428	67	86,060	62,767
up to 55%	66	126,706	119,376	106	95,544	85,606

Senate Races, 1974

% of general-election vote received by winner	Number of races	Average expenditure of winner	Average expenditure of loser
75-90%	2	$200,541	$ 15,754
65-70%	1	225,678	6,754
60-65%	8	727,207	305,300
55-60%	5	369,209	237,508
up to 55%	14	696,582	458,367

* See Appendix A, pp. A-1, A-3-A-4, *infra*.

In presidential elections, the limits are set far below the amount spent by Sen. McGovern in 1972 even when no adjustments are made for inflation. In presidential campaigns, moreover, the need to expend money in excess of the challenged limits is especially crucial. Given the importance of the President's role, and the history of expenses in past presidential campaigns, Findings I, 89, pp. 52-53, App. II-49-51, limiting expenditures in those campaigns must drastically alter the interplay of forces affecting presidential elections. See, *e.g.*, Findings II, A 71, p. 110; App. II-457.

The statutory limits are so low as to lack a rational basis. Thus, the parties have agreed that in the 1972 campaigns *it cost approximately 20¢ to make one mail or telephone contact with a voter.* Findings II, B 40, p. 200; App. II-580. The Senate limit is only 8¢ in the primary and 12¢ in the general election, plus 20 percent for fund raising.

The court below argues that great deference must be shown to Congress' judgment on this matter (op. at 1541). Quite apart from the fact that such deference in the context of this case is a virtual abandonment of the First Amendment, since any limit on speech could then turn on "facts" conclusively determined by the legislature, there is a way to test that judgment. *By use of the frank Congress has shown its judgment as to what are reasonable costs of communication with voters.* In the year 1974, over $38 million was spent on the congressional frank, Findings I, 36, p. 21, App. II-23, while major-party challengers spent in all primary and general-election campaigns a total of $20.2 million, Findings II, A 14, 24, pp. 89, 92, App. II, 442,444, for all their activities such as media, mailings, staff, rent, telephones, transportation, printing, etc. For the year 1976, $46.1 million has been budgeted for the frank, while all the campaign activities of challengers are now subject to the FECA limits. Given the interest of incumbent members of Congress in limiting their challengers' expenditures, while

stead increasing their own expenditures which are not subjec o the limits but produce political effects, to show great deference to congressional judgment in this case would be intolerable.

Not only will the limitations on expenditures have a dramatic rather than an incidental effect on political communication; they lack rational basis in other ways. For example, the Federal Election Commission has ruled that a candidate may spend up to the limit in a completely unopposed contest for nomination. FEC Notice 1975-27, 40 Fed. Reg. 36242 (Aug. 19, 1975). That a House candidate can spend $70,000 to win a completely unopposed nomination, but only $70,000 in a hotly contested general election, is a bizarre result of the statute. Moreover, the statute creates an incentive to spend up to the limit in unopposed primaries, in order for a candidate to increase his expenditures having general-election impact beyond the general-election limit. 33 *Cong. Q. Wkly. Rep.* 1242 (June 14, 1975). Total spending may thus be *increased* in some campaigns as a result of the statute. Indeed, this Court is asked to sustain legislation which is based upon the "skyrocketing" cost of campaigns, but which says that a Senator in New York can spend — and indeed is given a new incentive to spend — a million dollars seeking a completely unopposed nomination. A candidate who faces stiff opposition in a primary will clearly be disadvantaged if his general-election opponent can spend up to the limit in an unopposed primary which for all practical purposes is spending for general-election purposes. The magnitude of this disadvantage will largely depend on the wholly fortuitous variable of state-established primary dates; the later the primary — and some are as late as September — the greater the effect on the general election.

The FECA limits take no account of differences in primary dates or differences in state laws as to how a

nomination is won. Thus, in a state where primaries result only if a party's convention nominee is challenged, the limit cannot safely be spent ahead of the convention and not at all after it if no challenge occurs. See, *e.g.*, Conn. Gen. Stats. Ann. §§ 9-381 - 9-452, (1958).

Finally, the limits take no account of the countless variables which affect the cost of elections. See Findings I, 4, p. 2; App. II-5-6. From district to district and from state to state there are enormous differences in media coverage and media cost. *Id.* I, 86, pp. 50-51; App. II-49. In some districts and states there may be concentrated centers of population, while in others voters may be dispersed. Some candidates may find their greatest sources of strength in rural reas while others find theirs in urban areas, and their relative costs of communication may vary widely. Yet the challenged statutes irrationally tie all campaigns to the same Procrustean bed in complete disregard of the complexities of the political process. Such an exercise is not only irrational; it is potentially fatal to free political discourse.

D. *The Expenditure Limitations Are Unconstitutional Because They Discriminate Generally Against Challengers and Generally in Favor of Incumbents.*

If it can legitimately be said that the FECA limits on expenditures prevent "high" spending, it is a fact beyond challenge that successful challengers to incumbents have historically been "high" spenders.[6] Challengers are likely to

[6] The Court of Appeals stated that the District Court "properly declined" to find "undue discrimination in favor of incumbents" (op. at 1540). This statement is a misrepresentation of the fact-finding procedure below. In fact, the initial requests for findings, which included substantial requests for findings of a conclusory nature by both sides, were never ruled upon. It could be just as easily said that the District Court properly declined to find that the statutes were justified by a compelling governmental interest, a finding offered by appellees.

have low name recognition and other disadvantages which can be overcome only by a vigorous and inevitably costly campaign, no matter what the incumbent spends. The perquisites available to incumbents, moreover, entail governmental financial support of incumbent campaigns, *e.g.*, the frank. Limits only on direct campaign expenditures thus constitute a gross imbalance in ability to reach the voter, an imbalance without precedent in American history. Fleishman, "The 1974 Federal Election Campaign Act Amendments: The Shortcomings of Good Intentions," 1975 Duke L.J. 851, 878-89 (1975) (hereinafter, "The 1974 FECA Amendments").

The following table, based on Common Cause figures[7] for candidate expenditures adjusted for inflation, reflects the percentage of winning challengers in House races at each level of spending:

Percentage of Winning Challengers Compared to Percentage of Winning Incumbents at Various Spending Levels

Reported Expenditure Level	1972 % of Winning Challengers	1974 % of Winning Challengers
0 - $ 70,000	0%	28%
over - 70,000	100%	72%
$ 70,000 - 84,000	10%	20%
84,000 - 140,000	50%	38%
140,000 - 168,000	0%	13%
over 168,000 -	40%	3%

Findings II, A 3, 5, pp. 7-27, 32-58; App. II-269-318, 326-86.

[6] (continued)

To the extent that the Court of Appeals addressed the statistics in the record as to campaign spending in previous years, it relied entirely on comparisons with the so-called "combined overall expenditure limitations," which are misleading for a number of reasons. See Appendix A, pp. A-3 - A-4, *infra*.

[7] See Appendix A, p. A-1, *infra*.

In 1972, according to the same figures, the successful challengers spent an average of $148,115. This spending, moreover, almost surely was mostly in the general election, for in 1972 only 2 of the 10 winning challengers ran in a primary and received less than 55% of the vote. In 1974, of the 29 successful challengers who spent over $70,000, only 10 ran in a primary and received under 55% of the vote. *Id.*

In the 1972 Senate general elections, five challengers defeated incumbents. If adjustments are made for inflation between 1972 and 1974 and general-election spending is estimated by the Cole method,[8] all five spent at least 14.4¢ or $180,000; in short all exceeded the limits set by the FECA Amendments. In 1974, two Senate challengers won. Of these, one spent more than the overall combined expenditure limit, according to Common Cause figures. Findings II, A 30, p. 94; App. II-445. The other reported spending substantial sums after his primary date. September 12, 1974, which, if allocated to the general election, exceeded the 1974 limit. *Id.* II, C 3, pp. 210-13; App. II-587-94.

The facts thus are clear. Successful challengers to incumbents tend to be "high" spenders. (This is so even when the 1974 races are taken into account, races in which Republican incumbents were severely disadvantaged by the Watergate scandal and presidential and vice-presidential resignations.) Successful campaigns for change require substantial financial expenditures if they are not to be buried under the *status quo.*

Since the limits imposed on spending are, according to agreed facts, well below even one contact per voter (for the Senate, 12c per voter against a stipulated 20c cost of one contact, Findings II, B 40, p. 200, App. II-580), a candidate who begins with a low name-recognition factor (challenger) will have grave difficulty competing with one with a high name-

[8] See Appendix A, pp. A-2 - A-4, *infra.*

recognition factor and many previous voter contacts (incumbent).

There is thus a "floor" of spending which challengers must reach to be "viable," to obtain the voter recognition that enables a campaign to attract votes. The Senate challengers or campaign managers interviewed by Roland Cole in 1972 all said they needed a certain amount for their campaign, regardless of what was available to the incumbent opponent. Findings II, B 7, p. 192; App. II-574.

The marginal utility of initial spending is much greater to challengers than to incumbents. Each dollar spent by challengers below the "floor" of viability brings them a much greater return than that received for the same amount by incumbents. Once the challenger reaches that "floor" he has a viable candidacy. A limit can thus prevent challengers from ever gaining viability. Indeed, since campaign money is subject to the law of diminishing marginal returns, high-spending challengers may win even though outspent by their incumbent opponents.

The most dramatic example of high spending as a force for change is the McCarthy New Hampshire primary campaign. Although dubbed the "Children's Crusade" and portrayed by the media as largely a volunteer effort, McCarthy in fact spent $12 per vote received ($18 adjusted for inflation), Findings I, 43, p. 23; App. II-25. (Richard Nixon spent 67¢ per vote in the 1968 general election.) A considerable television and radio effort at the end of the campaign, moreover, was used to increase McCarthy's name recognition. Alexander, *Financing the 1968 Election* 39 (1971). Without that spending, his efforts and those of his supporters would have been in vain.

In the economic marketplace, a high level of advertising correlates with a high level of introduction of new product brands, Telser, *Advertising and Competition,* Journal of Political Economy (Dec. 1964), at 537. The

newcomer obtains more value out of its initial spending than the familiar product does by spending an equal amount on advertising. Few would doubt that a limit on advertising for automobiles, restaurants, or movie theaters would hamper newcomers. Similarly in politics, a low limit on expenditures will generally work to the advantage of incumbents and discriminate against challengers.

This phenomenon has been widely recognized by a wide variety of commentators on campaign financing, including appellees in statements made before this litigation was commenced: Herbert Alexander of the Citizens Research Foundation, *Hearings on S. 372, supra,* at 223-24; Russell Hemenway of the National Committee for an Effective Congress, *Hearings on S. 23, et al., supra,* at 75; appellee John Gardner, *Hearings on H.R. 7612 and S.372 before the Subcommittee on Elections of the House Committee on Administration,* 93d Cong., 1st Sess. 388 (1973), and Fred Wertheimer of appellee Common Cause, *Hearings on S. 23, et al., supra,* at 269. It has also been widely recognized in Congress. Among supporters of the FECA Amendments who have stated their belief that the challenged expenditure limits generally work to the advantage of incumbents are Rep. Frenzel, H.R. Rep. No. 93-1239, *supra,* at 151-52, and 120 *Cong. Rec.* H. 7846 (daily ed. Aug. 7, 1974); Rep. Brown, *id.,* H 7831; Sen. Clark, *id.,* S 18529 (daily ed. Oct. 8, 1974); Sen. Biden, *id.,* S 18534; and Sen. Cannon, *id.,* S 18535.

That incumbents frequently outspend their opponents is no answer to the argument that expenditure ceilings generally discriminate against challengers. Incumbents without serious opposition quite typically are easily able to outspend their opponents. Thus, in the chart reflecting House expenditures printed *supra,* p. 91, it is clearly demonstrated that the gap in average spending by winners and losers decreases with the closeness of the election. Thus where the winning percentage is 70 percent or greater, spending is relatively low and winners outspend losers

roughly 5 to 1. Where the winning percentage is 55 percent or less, however, spending is much higher and the gap virtually disappears. Since most big winners are incumbents and the limits do not seriously affect those races, the principal impact of limits will be on those close races in which usually spending is already fairly equal. Permitting spending in unopposed primary campaigns, moreover, clearly disadvantages challengers since they are unlikely to have substantial funds available at early dates.

Although the issue of "skyrocketing" campaign costs is presumably a matter for all to be concerned about, the idea that each House of Congress should set its own expenditure limits permeated the debate over the FECA Amendments. Particularly in the Senate, supporters of S 3044 admonished its opponents that it was the "prerogative" of the House of Representatives to "write its own ticket." Remarks of Sen. Kennedy, *120 Cong. Rec.* S 4470 (daily ed. March 26, 1974). See also remarks of Sen. Cannon, *id.,* S 4548; at S 4930 (daily ed. April 1, 1974), stating that if the House wished to lower its expenditure limitation to $50,000, "that would be perfectly all right with us"; and at S 5273 (daily ed. April 4, 1974).

Moreover, Sen. Cannon, as Chairman of the Senate Committee on Rules and Administration and a floor manager of S 3044, and of the subsequent Conference Committee bill, also admitted that he did not believe "the precise question was raised [in the hearings] as to whether the incumbent ought to get less than the person who is the challenger." Sen. Cannon then stated, "but in simple frankness, *if we wrote into the bill a different figure, we would kill the bill.*" 120 *Cong. Rec.* S 4940 (daily ed. April 1, 1974) (emphasis added). See also remarks of Rep. Pritchard, *id.,* H 7801 (daily ed. Aug. 7, 1974).

No wonder. Not only do incumbents have political advantages which can be overcome only by spending, but they

receive direct financial support from tax money which is not affected by limits on either contributions or expenditures.

Although difficult to quantify, the direct tangible support provided by the government to each House incumbent is almost $1 million per term. See p. 51, *supra.* Incumbents have paid staff, free telephone, office space in Washington and three offices in their home districts, subsidies for stationery and office supplies, access to inexpensive television and recording facilities, use of the frank, and many other benefits, all in addition to the normal benefits of incumbency such as high visibility in their districts and the ability to make news. Findings I, 24-33, pp. 15-21; App. II-16-23.

The FECA provides, moreover, that use of the television and recording facilities in non-election years is not to be treated as an "expenditure," 2 U.S.C. § 434(d), see, *e.g.*, Findings III, Steiger 11-12, p. 37; App. II-730. This permits the incumbent to do his filming in the year prior to an election, and leave only the cost of editing to be counted toward the spending limits.

Obviously, all of these services are frequently used for deliberate political purposes. Even when they are not, the most scrupulous Congressman will obtain a political advantage from them. *Id.* III, Steiger 7, 9-17, pp. 36-38; App. II-729-32. Appellants by no means contend that perquisites of incumbents which enable them to serve and communicate with their constituents are unjustified. But communication by challengers plays as critical a part in the political process.

Communication with constituents by incumbents necessarily yields political benefits. Similar communications by challengers must be paid for and are a campaign expenditure. An incumbent can have staff research issues and write policy papers on them. Challengers can do the same only by expending campaign resources. Challengers must rent offices. If a challenger wants to call a meeting, he must normally hire a hall and advertise it, while an incumbent member of Congress may be able to hold a well-publicized hearing in his home district. In raising small contributions, an incumbent has an advantage in that he has mailing lists which are regularly used, while the challenger must normally purchase or develop them on his own. Findings II, B 63, p. 205; App. II-584.

Consider just the effect of the frank. In the first two weeks of October, 1974, the House and Senate mailed 21.8 million pieces of franked mail. During the same two-week period in non-election year 1973, only 10.5 million pieces of franked mail were sent out. The average cost for the use of the frank per member of Congress per term is equivalent to $104,000, and rising. Expenditures on the frank in election years are almost twice the total amount spent by congressional challengers on all their campaign activities. This ratio may be increasing, since $46.1 million has been budgeted for use of the frank in fiscal 1976, $7.4 million more than in fiscal 1975, while challengers must spend within the FECA limits. *Wall Street Journal*, June 2, 1975, at 5, col. 1.

In addition, the use of direct-mail specialists and mass-mailing techniques applied to franked mail during election years clearly provide electoral benefits. They enable incumbents to build up mailing lists and experience in direct mail which are invaluable in raising small contributions.

These perquisites, moreover, are entirely within the control of incumbents, who can and do raise them at will. Indeed, the same House committee which passed on the challenged statutes also has control over the levels of these incumbent resources.

In the last five years, the number of congressional employees has grown from 10,000 to 17,000. Find-

ings I, 26, pp. 18-19; App. II-21. Office staffs of House members have been increased from 16 to 18 (an increase of 870 employees at a cost of nearly $10 million); the permament staffs of thirty House committees have been increased from 12 to 30; and the House Rules Committee (which passed on the FECA Amendments) recently voted to give each of its members a legislative assistant, thus tripling the size of the committee's staff. All committee chairmen and ranking minority members are to be entitled to another staff member in addition to the total allocated to their committees. Washington Post, June 1, 1975, at A9, col. 1. The Senate Rules Committee recently voted in favor of a proposal that would provide every Senator with a staff member for every committee on which he sits, unless he already has one designated (an increase for the entire Senate of approximately 100 staff members). Washington Post, June 4, 1975, at A8, col. 1.

In addition, the House has increased the number of paid trips to a member's district from 21 to 32, and has allotted tax money to pay for the printing of two newsletters per member. One editorial accurately described these increases as "re-election firepower." Wall Street Journal, June 3, 1975, at 15, col. 9.

In the sole passage of its opinion which may have reference to incumbent perquisites, the Court of Appeals said only that "any advantage gained by incumbents from service to their constituents is neither novel nor pernicious. Indeed, this may be a vindication of the principles of democracy" (op. at 1541). With all due respect, this is not a convincing apologia for legislation which prevents challengers from presenting their views and candidacies effectively.

Examining the impact of the challenged expenditure limitations without mentioning the enormous monetary advantages which incumbent office-holders appropriate themselves from the Treasury, as did the court below, is to ignore critical and manipulable political variables. Indeed,

it is like starting a basketball game with one team leading 50 to 0, and then "evenhandedly" limiting both teams to the same number of shots at the basket. Given the ample resources which incumbents put at their own disposal, the FECA is not even facially evenhanded. What it limits are *all* expenditures by challengers and *some* expenditures by incumbents.

In no sense, therefore, do the FECA Amendments "open up the system." They are "incumbents' protection" legislation which will freeze the *status quo* and further decrease the responsiveness of government to the people. Indeed, they will thus aggravate what may be the primary ill of the American political system: the security of incumbent officeholders. Political scientists are in agreement that since World War II incumbents have become much more likely to be reelected. Kostroski, Plaintiffs' April 3 "Documents," Ex. K, at 1217-18. Erikson, *id.*, Ex. F, at 1240. See also Cowart, *id.*, Ex. B, at 852; Cummings, *id.*, Ex. C, at 69; and Mayhew, *id.*, Ex. N, at 313-15.

The security of incumbents can hardly be denied.[9] As Charles Clapp said in his classic work on the House, "There is a tendency to believe that, aside from isolated instances where an overriding issue is present, there is little excuse for

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[9] David Broder has made the point cogently and concisely:

> "If you are an incumbent in office, you are in a strong position to publicize yourself and your views. So when you set limits—and I think this applies to questions of new parties versus established parties, challenging candidates versus incumbent officeholders, establishment views versus nonestablishment views—in every instance, when you limit expenditures on an across-the-board basis, what you are really doing is saying 'We are systematically going to tilt the thing in favor of those who already hold power and their points of view.'" ABA Special Committee on Campaign Reform, Symposium on Campaign Financing Regulation, 30 (1975).

defeat." 120 *Cong. Rec.* S 4938 (daily ed. April 1, 1974). In 1966, 25 out of 26 incumbents who ran for reelection in the Senate won, 20 out of 24 in 1968, 23 out of 26 in 1970, 20 out of 25 in 1972 and 21 out of 25 in 1974. In the House, the figures are even more dramatic. In 1966, 362 of the 402 who ran won, 396 of the 405 in 1968, 379 of the 390 in 1970, 366 of the 379 in 1972 and 343 of the 383 in 1974. The 1974 turnover, of course, followed the unprecedented resignations of a President and Vice President. Of the 40 who lost, 36 were members of their party. Findings I, 17, pp. 9-11; App. II-12-14. See also *id.*, I, 19-23, pp. 12-14; App. II-14-16. Indeed, between 1954 and 1968 only 8 percent of the House members and 15 percent of Senators running for reelection were defeated. It is precisely because incumbents are so secure that challengers have little chance to win unless they can spend substantial amounts.

There can be no question that a law restricting political communication in a way that discriminates against challengers and favors incumbents is unconstitutional, *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *Gould* v. *Grubb*, 536 P.2d 1337, 1345 (Cal. 1975). There are no countervailing governmental interests to justify such discrimination. If the First Amendment protects anything, it protects political communications by citizens trying to unseat those in power, *Sweezy* v. *New Hampshire*, *supra*, 354 U.S. at 250-51.

E. *The Limits Imposed by the FECA Amendments Violate the First and Fifth Amendments Because They Discriminate Against Certain Candidates and Parties.*

The majority below declared that the FECA was "without discrimination based on party . . . " (op. at 1518). In fact, the statute on its face prevents independent candidates from spending as much as party-sponsored candidates, prevents some party-sponsored candidates from spending as much as others and permits parties with na-

tional committees to spend more in presidential elections than those without. The court below never addressed these discriminations. No compelling interest is offered to support them. There is none to offer. They are demonstrably inconsistent with every tenet of a free society.

The FECA allows national or state political parties to expend 2¢ per adult on behalf of each of their candidates for federal office. 18 U.S.C. § 608(f). Independent candidates, lacking party structures, are not entitled to receive such additional support. This leaves independents unable to spend as much as their opponents, a patent violation of the Constitution. (The Republican Party is planning to raise and spend $20 million in private funds in 1976, twice as much as ever before. Broder, "The GOP's Financial 'Loophole,' " Washington Post, Sept. 14, 1975, at B 6, col. 3.) This discrimination cannot be cured simply by requiring independents to establish a party on "paper"; much of an independent's appeal, as Sen. McCarthy believes, is lack of connection with a party, an important asset at a time of alienation from the major parties. McCarthy dep. tr. 8-10; Monroe aff. ¶ 7.

The constitutional rights of party candidates are also infringed by limiting their spending while giving their state and national committees an option as to whether to support them with the permitted extra expenditure. If for some reason a candidate has alienated those who control the committees or does not receive the money for other reasons, he will face an opponent whose expenditure limit is greater than his. This also is a patent violation of the Consitution, serving no rational purpose, let alone a compelling governmental interest.

In addition, parties such as the Conservative Party of New York, which do not have a national committee, Findings III, Mahoney 2, p. 11, App. II-708, are not entitled to the extra expenditure on behalf of their candidate for President

as are parties with a national committee. Such a restriction demonstrably harms the Conservative Party, its candidates and its supporters, whether it nominates a candidate for President nominated by one of the two major parties or someone else, Mahoney aff. §§ 7-8.

These distinctions between various kinds of party committees, other formal political committees, and informal associations are unprecedented in American election law and serve no purpose other than discrimination. As such, they infringe the rights of speech and association, and work an invidious discrimination among different kinds of political movements.

IV.

The Limitation on Independent Expenditures Violates the Constitution.

Title 18 U.S.C. § 608(e) prohibits persons or groups completely independent of any candidate from spending more than $1,000 per year "relative to a clearly identified candidate" and "advocating the election or defeat of such candidate."[1] This statute makes it a federal criminal offense for a citizen to place a one-quarter page advertisement in the *New York Times* or the *Washington Post* urging his fellow citizens to vote for (or against) the President of the United States. Findings I, 65, pp. 32-33; App. II-32. As such, it is an extraordinarily explicit restriction on individual political activity and one without precedent in the history of the republic. Section 608(e) and the First Amendment cannot stand together. One or the other must fall.

A more sweeping intrusion upon free political expression is difficult to imagine. No person or group, no matter how independent of any candidate, may spend more than $1,000 to speak, so long as that speech is construed as "advocating the election or defeat of" a candidate.[2]

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[1] 2 U.S.C. § 434(e) imposes, on all those who make such expenditures in excess of *$100* per year, onerous disclosure and reporting requirements. See pp. 189-92, *infra*. The Act thus captures independent political speech coming and going.

[2] The history of Section 608(e) itself suggests its unconstitutionality. It was designed to avoid the problems raised by the candidate-certification requirement of Title I of the FECA of 1971, which required that the media, before accepting advertisements "on behalf of" candidates, obtain certifications from candidates that the advertisements purchased would not cause the candidate to exceed the media spending limit. In the case of advertisements derogating a candidate, the media had to determine a lack of any connection with the opposing

(continued)

The limitation on independent expenditures applies no matter how critical is the choice between candidates or issues. Unforeseen events may vastly change the stakes in an election or raise new and critical issues near the end of the campaign, which an individual or group may wish to address. Yet, once the $1,000 is expended, any further speech is a federal crime.

The limit is *not* to be adjusted to changes in the Consumer Price Index.[3] Not only is the limit low, and getting lower because of inflation, but it takes no account of differences in costs between areas, media outlets, and kinds of activities suited for particular issues, *id.* I, 86, pp. 50-51; App. II-49.

The Senate Report justifies the drastic limiting of independent expenditures as "the best compromise of competing interests in free speech and effective campaign regulation." S. Rep. No. 93-689, 93rd Cong., 2d Sess. 19 (1974). The Report also states that "the bill [S. 3044] preserves to everyone *some* right of political expression . . . ,"

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[2] (continued)
candidates. When the New York Times refused to accept an advertisement offered by the American Civil Liberties Union and appellant NYCLU, which listed the members of Congress who voted against President Nixon's busing proposals but was not accompanied by the required certifications, the statute was challenged and held unconstitutional, *ACLU* v. *Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom. Staats* v. *ACLU*, 43 U.S.L.W. 5043 (1975).

To avoid the unconstitutional prior restraint of the candidate-certification mechanism, Congress instead enacted a flat monetary ceiling on the same speech.

[3] Since expenditures by candidates and parties *are* so adjusted, the discrepancy between what campaigns can do and what private citizens can do in the way of political speech, already great, will become steadily greater. No reason for this irrational discrimination has to our knowledge ever been suggested.

id. (emphasis added). See also H.R. Rep. No. 93-1239, 93rd Cong., 2d Sess. 6 (1974).

Preserving "*some* right of political expression" is not sufficient to pass constitutional muster. "*Some* right of political expression" would be preserved if *Mills* v. *Alabama, supra, Miami Herald* v. *Tornillo, supra,* or even *New York Times* v. *Sullivan, supra,* had gone the other way. The preservation of "*some* right of political expression" is simply not what the First Amendment is about.

For Section 608(e) to be sustained, it would have to be assumed that individual citizens and independent groups have nothing to add to the public debate. Under Section 608(e), virtually all political activity must now be absorbed by, and emanate from, candidates' campaigns and party committees and the institutional press. Issues not adequately debated by the campaigns, and not deemed significant by the institutional press, are simply not to be discussed except in the abstract. This is no trivial matter, for candidates frequently avoid delicate issues, and the only way such issues can be discussed is through independent activities by persons and groups hoping to influence the campaign and the election.

While the institutional press certainly contributes in major, essential ways to public debate, and its power to do so must remain completely untrammeled, *see, e.g., Miami Herald* v. *Tornillo; Mills* v. *Alabama, supra,* the First Amendment's protection of freedom of expression comprehends much more than the rights of the institutional press. Paid advertisements, like the humblest flyer or leaflet expressing views on public issues—"every sort of publication which affords a vehicle of information and opinion," *Lovell* v. *Griffin*, 303 U.S. 444, 452 (1938)—*are part of the press themselves. Accord, New York Times* v. *Sullivan, supra; Martin* v. *Struthers*, 319 U.S. 141 (1943); *Branzburg* v. *Hayes*, 408 U.S. 663, 704 (1972); *Bigelow* v.

Virginia, supra. Paying for the publication of such materials is the principal type of independent expenditure prohibited by the statutes. The FECA's restriction on independent expenditures thus undercuts a primary forum for the expression of opinion on public questions, namely, the paid "editorial" advertisement which "communicate[s] information, express[es] opinion, recite[s] grievances, protest[s] claimed abuses . . ." or seeks financial support for important social movements, *New York Times* v. *Sullivan,* 376 U.S. at 266. There, the Court ruled that to deny such advertisements First Amendment protection because they are paid for "would discourage newspapers from carrying editorial endorsements of this type, and so might shut off an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities—who wish to exercise their freedom of speech even though they are not members of the press," *id.*

While the legislation exempts most[4] newspaper stories, commentaries and editorials from the limitations on independent expenditures (18 U.S.C. § 591(f)(4)(A)), this explicit protection of the organized press cannot serve as a kind of constitutional trade-off justifying the suppression of independent speech and press. It turns the First Amendment on its head to suggest that, because a newspaper publisher remains free editorially to endorse a candidate for President, it can constitutionally be made a crime for anyone else to take out an advertisement in the same newspaper which does no more than set forth the text of the editorial. Freedom for news stories and editorials is a necessary prerequisite for a free society, see, *e.g., Grosjean* v. *American Press Co.,* 297 U.S. 233 (1936); *Estes* v. *Texas,* 381 U.S. 532 (1965), but it is by no means the only prerequisite. See *Police Department of Chicago* v. *Mosley,* 408 U.S. 92 (1972), striking down on equal-protection grounds a city ordinance prohibiting labor picketing near schools while other picketing was prohibited.

[4] Even newspapers and other media are embraced by the statute if "owned or controlled by any political party, political committee, or candidate," 18 U.S.C. § 591(f)(4)(A). Matter in such organs deemed favorable to a candidate is thus subject to the expenditure and independent-expenditure limitations of the Act. The Framers, who were intimately familiar with press organs controlled by political parties or candidates—a connection typical in their time, see Mott, American Journalism 124 (1950), and frequent throughout our history—would have been astonished at the notion that such organs did not enjoy full First Amendment protection.

By the same token, institutional political parties play a vital role in the American political process, shaping policies and candidacies. And restrictions on such activities would also be unconstitutional. See, *e.g., Kusper* v. *Pontikes, supra; Jennes* v. *Fortson, supra.* But protecting, and indeed enhancing,[5] the power of political parties cannot be a constitutional substitute for the right of independent political speech and press.

The freedom to make independent expenditures relating to elections is particularly important for groups not committed to political parties or political candidates. They may well disfavor the positions of all the candidates but on balance prefer one to the others, as in Professor Rosenthal's example of the 1968 campaign button "Reluctantly for Humphrey." Rosenthal, *Federal Regulation of Campaign Finance: Some Constitutional Questions* 35, n. 75 (1971) (hereinafter *Federal Regulation).* Such activities, like appellant Mott's "negative research" project on the sources of presidential candidate Muskie's campaign contributions, Findings III, Mott 14, p. 29, App. II-724, may well force a candidate "off the dime," thus raising the level of campaign debate.

[5] A group of political scientists recently concluded that one of the major effects of the FECA is to magnify the power of party committees and structures because of their ability to make additional expenditures on behalf of their candidates. ABA Special Committee on Election Reform, Symposium, *supra, passim.*

The court below held that the limitations on expenditures and contributions will not be fully effective if individuals and groups can make independent expenditures (op. at 1530). See also S. Rep. No. 93-689, *supra*, 18. That logic, however, compels a complete prohibition of the discussion of candidacies outside the control of campaigns. For it can hardly be contested that demonstrations, rallies, newspaper articles, television coverage, and the like—let alone explicit editorial endorsements of a candidacy—also tend to undercut spending and contribution limits to the extent they benefit one candidate over another. And often that benefit is far more valuable than a $1,000 expenditure.

That the prohibition of Section 608(e) is "flatly unconstitutional," Alexander M. Bickel, in Rosenthal, *Federal Regulation*, *supra*, at 66, seems beyond doubt.[6] See *Hallihan*, "The Federal Election Campaign Act Amendment of 1974: The Constitutionality of Limiting Political Advertising by the Non-Candidate," 3 Fla. St. U.L. Rev. 266, 282-89 (1975); Fleishman, "Freedom of Speech and Equality of Political Opportunity: The Constitutionality of the Federal Election Campaign Act of 1971," 51 No. Car. L. Rev. 389, 473-77 (1973) (hereinafter "Fleishman, The FECA of 1971"); Redish, "Campaign Spending Laws and the First Amendment," 46 N.Y.U. L. Rev. 900, 920-21 (1971); Emerson, *The System of Freedom of Expression* 639 (1970).

Section 608(e) cannot be saved by the Court of Appeals' view that it does not forbid "issue" activities which are not "relative to" particular candidates or do not advocate their election or defeat (op. at 1530-31). Even as so

[6] The ABA Special Committee on Election Reform stated that ". . . limits on independent citizens and groups present substantial legal questions because of their potential curtailment of First Amendment rights." ABA Report at 5. The ACLU similarly opposes a limit on independent expenditures. ACLU Report at 12-13 (1975).

limited, the statue is flatly unconstitutional for all the reasons set forth above.

The majority's construction, moreover, raises a host of other problems. Speech on public issues can rarely go forward without mentioning the conduct of public officials; and if those officials are candidates for federal office, the restrictions of the section potentially arise. As one commentator asked, "[w]here does advocacy of a principle end and support of a candidate begin?" Rosenthal, "Campaign Financing and the Constitution," 9 *Harv. J. Legis.* 359, 393 (1972) (hereinafter, "Campaign Financing").[7]

In its effort to narrow the statute's reach, the Court of Appeals added additional language ("clearly" advocating the election or defeat of a candidate, as opposed to relating "primarily" to issues of public policy) which can only confuse the already vague and sweeping contours of the section.[8] In such circumstances, the vagueness has "some of the evils of a continuous and effective restraint."

[7] George Agree posed the following scenario as a graphic example of the intractable nature of the problem:

> "In 1968, I got some money together for a group of black leaders who, late in October, addressed a message in a full page ad in the New York Times, to Gene McCarthy. And it said, 'Please do not turn your back, Senator McCarthy.' And it went on, from black people, with a long text on why he should come out in favor of Humphrey. Now, to whom do you attribute that expenditure. These were black people who felt that a public personality was not properly cognizant of the issues of concern to them, and who addressed a message to him in the open. What do you do about that?" ABA Special Committee on Campaign Reform, Symposium, *supra*, at 100.

[8] A continuous stream of questions will arise as to whether language such as *"In Your Heart, You Know He's Right"* or *"Goldwater for Halloween"* advocates an issue or a candidate.

United States v. *Harriss*, 347 U.S. 612, 633 (1954) (Douglas, J., dissenting).

As a consequence, groups such as the NYCLU or the Impeachment Committee will still have to guess whether their issue advertisements and statements come within Section 608(e) as amended by the Court of Appeals, and will still have to draft every such pronouncement with an eye toward how the staff and members of the FEC will interpret it. Independent groups and individuals will thus face a triumvirate of unacceptable choices—drastically tailoring their message to avoid the statute's reach, publishing their message at the risk of criminal penalties, or seeking the FEC's approval.

Moreover, the "loophole" is not closed if *"X means nuclear holocaust; Y means peace and prosperity"* is not prohibited. All that will happen is that some lawyers will turn from drafting bond indentures to drafting political slogans.

In any event, present case law gives special recognition to the preferred position of speech about public officials and political candidates. Indeed, ". . . it can hardly be doubted that the Constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office," *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971). Into this area of uniquely vital discourse comes now Section 608(e), with the result that the Constitution protects the right of individuals to make relatively outrageous statements about candidates while Section 608(e) would prohibit them from making very many statements about them of any kind.

The difficulties of enforcing Section 608(e) must also cause serious constitutional questions. Because it will necessarily entail highly individualized inquiry by the FEC and the courts into the actions of individual citizens, the

likelihood of particularized and discriminatory enforcement is considerable. Close scrutiny of those who make independent expenditures will be necessary, or else Section 608(e) will soon become "more loophole than law." Surely a newspaper knowingly publishing an advertisement which violates Section 608(e) is aiding and abetting the crime, and an FEC regulation requiring that newspapers send to the FEC all political advertisements with the name of the purchaser and the amount paid would vastly aid enforcement efforts. Even now, 2 U.S.C. § 434(e), compels anyone making independent expenditures of more than *$100* to file detailed reports with the FEC, a chilling invasion of individual privacy.

There is no precedent whatsoever for such a drastic limitation on individual political activity. In *Civil Service Commission* v. *National Association of Letter Carriers*, 413 U.S. 548 (1973), this Court upheld certain Hatch Act limitations on political activities by government employees. The Court took care to indicate that the limitations could be justified, if at all, only by the nature of public employment: "the government has an interest in regulating the conduct of its employees that differ[s] significantly from those it possesses in connection with regulation of the speech of the citizenry in general," *id.* at 564. The Hatch Act, moreover, allows the option of leaving public employment, a sacrifice to be sure, but considerably less than that needed to avoid Section 608(e)—leaving the United States. The "judgment of history," *id.* at 567, that the federal civil service and partisan political activity should not be intertwined finds no parallel here. American citizens are not servants of the state.

V.

The FECA Limits on the Size of Individual Contributions Are Unconstitutional.

A. *Wholesale Limits on Individual Contributions Violate the First Amendment.*

The court below, in two paragraphs, held that Congress has virtually unlimited power to limit contributions to candidates (op. at 1528-29). Such a pervasive ruling disregards the impact of such stringent prohibitions on donors, candidates, supporters of candidates, volunteers and on political communication generally. Because the Court mistakenly assumed that equality in fact, rather than merely in the abstract, would be furthered, it endorsed a statutory scheme which enhances the power of organized economic interests by suppressing the political activity of others.

The FECA Amendments (a) limit contributions by individuals and most groups to candidates for federal office to $1,000 per election; (b) limit to $25,000 the aggregate contributions to candidates by an individual per election; and (c) limit to $5,000 contributions by political committees which have been registered for six months and have received contributions from over fifty persons. 18 U.S.C. § 608(b). Incidental expenses of volunteers, *e.g.*, travel expenses, become a contribution when in excess of $500. *Id.*, § 591(e) (5). The expenditure of personal or family funds by candidates is limited to $25,000 in House races, $35,000 in Senate races, and $50,000 in the case of the Presidency. *Id.*, § 608(a).

Two basic arguments were employed by appellees and the court below to justify these proscriptions: (1) the need to avoid the reality and the appearance of corruption, and (2) the need to avoid the reality and appearance of "undue influence," particularly by "special interests," with the

wealthy having a "stronger political voice than the unwealthy" (op. at 1515-17).

In either case, concern over "appearances" cannot justify such legislation. If it "appears" that corruption abounds or that the wealthy have too great a voice, the voters have an easy and effective remedy so long as there is proper disclosure. To assert that a blanket proscription is necessary to avoid an "appearance" is to say that voters cannot be rational and cannot react to appearances as well as the sponsors of this legislation. *Civil Service Comm'n* v. *Letter Carriers*, 413 U.S. 548 (1973), is wholly distinguishable since, in the case of partisan activities by governmental employees, disclosure is not a remedy responsive to the governmental interest at stake there, because civil servants are not elected.

The *reality* of corruption is serious, but not a compelling justification for the particular FECA restrictions. Appellees and the court below rely heavily on instances of illegal corporate or union contributions, Findings I, 112-21, pp. 99-107, App. II-148-54, evidenced by numerous indictments handed down under prior law (18 U.S.C. §610). New legislation which, apart from certain provisions not challenged by appellants, *e.g.*, 18 U.S.C. §615, adds nothing to previous law in this area is not a responsive remedy. The failure to enforce old laws is no justification for regulating unrelated conduct which was previously lawful. It would have to be shown, at the least, that the old statutes had proven unenforceable even though diligent attempts at enforcement had been made, and that nothing short of the new approach would be effective. None of this has even been alleged, let alone demonstrated.

If a small minority of political contributions are given to secure appointments for the donors or some other *quid pro quo*, that cannot serve to justify prohibiting all large contributions, the vast majority of which are given not for

any such purpose but to further the expression of political views which the candidate and donor share. Where First Amendment rights are involved, a blunderbuss approach which prohibits mostly innocent speech cannot be held a means narrowly and precisely directed to the governmental interest in the small minority of contributions that are not innocent. *Aptheker* v. *Secretary of State, supra; United States* v. *Robel, supra.* Moreover, there are available a host of narrower regulations, which the majority below did not address, which would limit or eliminate improper contributions while leaving genuine political advocacy untouched.

To the extent a remedy is called for, properly drafted disclosure provisions provide it. Value judgments about the merits of a cause are for the voters. If they believe, after the full facts are made available, that a candidate is unduly swayed by the influence of "special interests," they can demonstrate their displeasure effectively. That disclosure is effective is strongly suggested by the ultimate result of Watergate.[1]

The court below suggested that limits on contributions can be upheld in the name of equality of political voice (op. at 1517). That contention is at odds with the law of this Court. In *Miami Herald Publishing Co.* v. *Tornillo, supra,* this Court held that a state may not compel a newspaper to print a reply to an editorial attacking a political candidate. If such a legal requirement were im-

[1] As the ACLU has noted, "[b]ig contributions may have a corrupting influence on one campaign and an indispensable role in getting a dissenter started in another. *Limits on contributions are only defensible if the price we wish to pay for reducing corruption is favoritism for the status quo.* If, instead, we want to limit corruption while placing no greater obstacles in the way of dissenters than exist anyway, the proper course is to require disclosure of potentially corrupting contributions. That way, voters can refuse to elect candidates because of their obligations, but the government can't step in to prevent a candidate from being heard." ACLU Report at 17.

posed, the Court reasoned, newspapers would be reluctant to write controversial editorials or print other controversial matter. The Court explicitly recognized that its decision permitted papers to attack candidates who have little recourse. Similarly, the Court struck down a bar on last-minute election editorials by newspapers, even though an adequate response by an attacked candidate might not be possible. *Mills* v. *Alabama, supra.*

In both these cases, the challenged statute sought to bring about evenhandedness and equality in political debate. This Court, however, struck them down because they would have reduced the level of communication by deterring the publication of controversial material, even though it was assumed, *arguendo,* that the challenged legislation would enhance equality of "political voice." These cases stand foursquare, therefore, for the proposition that *government may not attempt to bring about equality of political speech by reducing the total level of political communication.*

The cases relied on by the court below, invalidating the poll tax, *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966), large filing fees, *Bullock* v. *Carter,* 405 U.S. 134 (1972), and malapportionment, *Reynolds* v. *Sims,* 377 U.S. 533 (1964), are perfectly consistent with the *Tornillo* and *Mills* principle and, if anything, demonstrate the invalidity of the FECA.

Each case cited by the Court of Appeals involved a disadvantage or disability directly imposed by governmental action which was on its face inconsistent with the maintenance of a high level of political communication. Each, moreover, might well be thought to favor incumbent officeholders. In the case of reapportionment, for example, the steadfast refusal of incumbents to correct even the most

patent inequities was well known.[2] Finally, the disadvantage to those excluded—denial of the right to be a candidate, to vote, or to cast an undiluted vote—was beyond question.

By contrast, private campaign financing does not involve governmental action; rather it is the FECA which constitutes the act of government that intrudes on an open and freely operating political process. In addition, the FECA effects a deliberate reduction in the level of political communication. Further, the FECA aids incumbents by, *inter alia*, limiting expenditures, *supra*, pp. 79-106, limiting contributions, *infra*, pp. 127-40, vesting the power of appointment of two-thirds of the FEC commissioners in Congress, *infra*, pp. 193-210, and subjecting the exercise of FEC discretion to congressional control, *infra*, pp. 208-10. These considerations clearly suggest the unconstitutionality of the FECA under *Harper*, *Bullock*, and *Reynolds*.

One who is prevented from voting by a poll tax is disadvantaged by government in a way that is simply not the case where the non-contributor is concerned. Contributions increase the level of political information at the voters' disposal by increasing the level of communication. The First Amendment embodies a policy which places a high value on political debate, and contributions plainly work to that end.

The "inequality" rationale assumes that non-contributors are disadvantaged by the campaign contributions of others. That is not the case: those who opposed the war in 1968 were in no conceivable sense disadvantaged by the fact that Sen. McCarthy was enabled by large, private contributions to run a viable campaign in New Hampshire.

[2] *Cf.* San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 17-18 (1973) (Bullock v. Carter described as involving a state filing fee which "effectively barred all potential candidates who were unable to pay the required fee").

Non-contributors who shared Sen. McGovern's views about the redistribution of income were not disadvantaged by the $636,882 Sen. McGovern received by the time of the 1972 New Hampshire primary but which the FECA would outlaw. Those who favored the cause of civil rights were not disadvantaged by President Johnson's ability to raise funds in 1964. Large contributors are thus often functional representatives of other people who are not themselves contributors.[3]

Contributions run to all kinds of candidates and all kinds of causes. The record demonstrates beyond any possible doubt that campagn money knows no ideological limits. That is patently true of presidential races. And certainly the notion that private campaign financing runs in large amounts only to those who champion the interests of the wealthy is a myth. Among the candidates in the most expensive twenty-five House races in 1972 were:

Candidate	*Expenditures*
John Kerry	$279,746
Paul McCloskey	321,558
Abner Mikva	218,543
Allard Lowenstein	285,475
Robert Drinan	199,703
Andrew Young	159,431
Ronald Dellums	100,853

Findings II, A 8, pp. 76-81; App. II-422-31.

Equality seems furthered by limits on contributions only if the rhetoric employed focuses solely on the contributor and does not afford a true perspective of the role of

[3] As Prof. Rosenthal has succintly stated, ". . . inequality in the power to persuade voters (whether for financial or other reasons) is not the same as inequality in the right to vote." Rosenthal, "Campaign Financing," *supra*, at 376.

large contributions. Large contributions must also be viewed in terms of the recipients and supporters of the recipients, and they are often society's underdogs.[4]

"Fat cats" like Robert Morris and Haym Saloman financed the American revolution, Steeg, *Robert Morris: Revolutionary Financier* 169 (1954); Barnard, *This Great Triumvirate of Patriots* 43, 67 (1971). In the next century wealthy northerners like Arthur and Lewis Tappan, Francis Jackson, and Richard Fletcher sustained the abolitionist movement in its early years. Lader, *The Bold Brahmins* 71-72, 82 (1961).

After the Civil War, organizations like the NAACP relied on the contributions of Oswald Garrison Villard and Julius Rosenwald (who spent $60-$70 million in helping minorities) and others. Eventually the NAACP expanded its financial base, but in 1914, for example, "more than half the income of the NAACP came from eighteen individuals." Kellogg, *NAACP, Volume I: 1909-1920* 106 (1967). The Urban League's history is similar. In Chicago, as elsewhere, "during the opening period several large pledges were obtained to provide the initial impetus for the campaign." Strickland, *History of the Chicago Urban League* 97 (1966).

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[4] The simple way to avoid disadvantaging low-income groups is to encourage the dissemination of *more* political information, not less. When less information is available to voters, low-income citizens are the chief victims. As one scholar explained:

> ". . . the cost of information is harder for low-income citizens to bear; hence more of them are likely to be uncertain because they lack information. Since uncertainty reduces the returns from voting, a lower proportion of low-income groups would vote even if voting costs were equally difficult for everyone to bear." Downs, An Economic Theory of Democracy 273 (1957).

Other examples abound. Albert DeSilver sustained the ACLU for many years; the early twentieth-century peace movement depended on Andrew Carnegie and Edward Ginn, and Bernard Baruch sponsored slum clearance and hospitals. *ACLU 1924 Annual Report; ACLU 1928-1929 Annual Report;* Coit, *Mr. Baruch* 197, 454 (1957). Today, huge foundations continue as patrons of unpopular causes. The messages of such causes began as unpopular whispers shunned by the press and misunderstood by most people. No legislature would have ever voted them funds. In order to join the national debate, all of these reform groups looked successfully to wealthy patrons.

The history of certain of the appellee organizations also shows the need for initial large contributions. Appellee Center for Public Financing of Elections received in 1973, for example, $68,751 from 23 contributors (an average per contributor of almost $3,000). Findings I, 69, p. 33; App. II-32. A member of appellee Common Cause Board of Directors testified that large contributions were crucial to the organization's creation. Palevsky dep. tr. 76-77. Common Cause has received approximately $70,000 from the Rockefeller family alone, including $55,000 from John D. Rockefeller III and $1,500 from Nelson Rockefeller, *id.* 87, p. 51; App. II-49.

Much of this history is misunderstood because it is assumed that each dollar is of the same value to every movement and that any difference in fund-raising ability is an intolerable inequity. That is not the case. The financial resources available to NAACP and the National Association of Manufacturers (NAM) have been disparate throughout this century, but one has brought about a social and legal revolution while the other has been fighting a largely rearguard action. Had there been no private financing, the positions of the NAM would have nevertheless received sub-

stantial exposure and support, because it represents the *status quo*, while those of the NAACP would have survived, if at all, as a largely unheard, underground movement. The value of each dollar to the well-publicized *status quo* position is always less than to a nascent movement pressing society to move in a new direction.

What is true of organizations is also true of political candidates. The challenger, the underdog, and the candidate espousing change need large contributions to get started if a serious challenge is to be made. Thus, in the following section, pp. 127-38, *infra*, we will demonstrate how candidates espousing new ideas or challenging incumbents needed large amounts of money initially to wage a viable campaign.

Finally, equality of political communication is not a goal which law can pursue without great peril. Short of silence—the only state in which communication is in fact equal—legal restraints are likely to bring about more rather than less inequality. The distribution of political resources is in no way "equal" and is simply not subject to "equalizing" without drastically reducing the amount of political speech. As David Broder has pointed out, "[l]egislation that eliminates the dollar influence on politics automatically enhances the influence of those who can provide manpower or publicity for the campaign." 120 *Cong. Rec.* H 7813 (daily ed. August 7, 1974).

The statute distinguishes between the volunteering of personal services and the contribution of money used to purchase those services, 18 U.S.C. § 591(e). It thus distinguishes between the lawyer who contributes his services to a candidate to aid him in complying with the complexities of the FECA, and his contribution of money because he has fallen ill and is temporarily disabled. As with economic resources, political resources are often fungible. To the participants (whether they be donors, recipients or supporters), the contribution of services and the contribution of money are functionally similar activities.

This functional similarity not only permits the extension of limitations to other activities but seems actually to mandate it, as the FECA provisions demonstrate in the limitation on independent expenditures and disclosure of those that are made if greater than $100, and in the limitation of incidental expenses of volunteers. Large contributors tend to be activists in many ways, most of which involve substantial expenditures. Thus appellant Mott, a heavy financial contributor to various campaigns, has also contributed to a number of other organizations and causes and views all these contributions as essentially similar. Findings III, Mott 1-21, pp. 26-32; App. II-721-26. Another example is Martin Peretz, a heavy contributor to congressional campaigns, *id.* II, A 117, p. 139-41, App. II-478-81, who has also funded the SDS and *Ramparts* magazine and has bought *The New Republic*, *id.* I, 138, p. 129; App. II-190. All such activities further the political goals and purposes of the individuals involved, as do campaign contributions.

There are at least thirty ways of participating in the political process, *Id.* I, 5, p. 2-4, App. II-68, only three of which (v, x and y) are regulated by the challenged statutes, even though many others are of comparable or greater effectiveness than campaign contributions and involve the use of money for political purposes. Some people have considerable free time; the media involve concentrated economic unity and wield enormous political influence; and incumbent officeholders possess numerous resources which benefit them politically. None of these are touched by the statutes.

Limiting financial contributions to candidates only magnifies all these other inequalities. Indeed, the effect of the $1,000 limitation may well discriminate in favor of the very wealthy. While the moderately wealthy must forgo a

$3,000 contribution, the very wealthy form study groups, own newspapers and magazines, or engage in extensive political activity because of their resources and free time.

The rhetoric of equality of speech, moreover, is rhetoric which must in the end sweep away free political communication. It is a short step to apply that rhetoric to the media, especially to such large economic entities as the television networks, *Washington Post*, the *New York Times*, and the *Chicago Tribune*. Findings I, 60-64, pp. 30-32; App. II-30-32. One already sees such stirrings. Phillips, *Mediacracy* 24 *et seq.* (1975). Indeed, logic itself—not to mention equality—suggests it is totally irrational to permit William Loeb, publisher of the *Manchester Union Leader*, broad freedom to employ economic resources to attack a candidate while restricting the right of that candidate's supporters to employ economic resources in defense. The concern of the court below that the "wealthy few" not have "a stronger political voice than the unwealthy many . . ." (op. at 1517) is a concern which strikes as directly at the press and electronic media as at campaign contributions.

Limits on individual contributions will, moreover, induce potential political contributors to donate funds instead to "issue" groups. That, in turn, may create additional pressure for Congress and the courts to see that "issue" organizations also are regulated in the way that political campaigns are — a clearly unconstitutional approach, op. at 1549-60, *ACLU* v. *Jennings; United States* v. *National Committee for Impeachment, supra.* The Conference Report's suggestion that disclosure be extended to "issue" groups because "they use their resources for political purposes" is a chilling reminder of just how slippery the slope is. S. Rep. No. 93-1237, 93d Cong., 2d Sess. 83 (1974).

Finally, the equality problem is democratically resolved by disclosure of large contributions with a potential for influence. If a candidate is taking "too much" money

from large contributors, the citizens have swift and effective recourse. And that, rather than the restriction of political communication, is the remedy that should be relied upon in a democratic nation which trusts its voters.

B. *The FECA Limits on Contributions Discriminate Against Challengers to Incumbent Officeholders and Against Minor Parties and Independent Candidates in Violation of the First and Fifth Amendments.*

> "[L]ower limits on campaign contributions, *by themselves, would serve to increase the advantages incumbents presently have in fund raising.*"

This bald, unequivocal statement is from the Senate Report accompanying the FECA. S. Rep. No. 93-689, *supra*, 10 (emphasis in original). Because the original Senate version of the FECA Amendments, S. 3044, provided public funding for all federal (not just presidential) elections, the Senate Committee on Rules and Administration could be candid about the impact of the FECA limits on the size of contributions. As passed, the FECA Amendments contained no public financing for congressional elections. The Committee statement thus stands as a flat admission that the contribution limits discriminate in favor of incumbents. Rep. Anderson, a leading sponsor of the FECA Amendments, stated a similar proposition in the House debate on H.R. 16090, 120 *Cong. Rec.* H. 7924 (daily ed. Aug. 8, 1974).

Why the Report's frank admission is demonstrably true is illustrated by Congress' refusal to provide services to challengers. For example, it would be a simple matter to allow use of the franking privilege to any candidate on the ballot. This was rejected in the Senate on the grounds that it was far too complicated, a pitifully inadequate excuse. S. Rep. No. 93-689, *supra*, at 5.

We have already shown (pp. 86-104, *supra*) the many advantages incumbents have in election campaigns and the extent to which these advantages are enhanced by a limit on expenditures. The limits on the size of contributions operate to the same end. In effect, incumbents can vote themselves the equivalent of large contributions in the form of more staff, offices, franked mail, etc., while challengers are severely hampered in the fund raising which is necessary to purchase those items. The statute in effect limits, therefore, *some* contributions to incumbents and *all* contributions to challengers.

Appellees contended below that, because the percentage of money received in contributions over $1,000 is greater for incumbents than for challengers when the figures for all congressional elections are aggregated, the statute will not have any harmful effect on challengers. Findings II, A 55, p. 103, App. II-452; *compare id.*, A 115, p. 133 at p. 135; App. II-473, 475. By its own terms, this argument is true only if the marginal value to the candidate of a dollar contributed to a challenger and of a dollar contributed to an incumbent is the same. Since the marginal utility of money is greater to challengers than to incumbents, appellees' figures themselves demonstrate that the limitation on individual contributions discriminates against challengers. Cole dep. tr. 376-79. Because limits on contributions reduce the amount of campaign money available to challengers, they have precisely the same effect as limits on expenditures.

Even on an *a priori* basis, appellees' theory is erroneous. The limits on contributions will necessitate new fund-raising methods, principally greater reliance on direct-mail techniques. The agreed facts establish, moreover, that incumbents have advantages over challengers in raising small contributions. They are well known; they are experienced in dealing with their constituents through the mail; they have mailing lists (both from use of the frank

and from previous fund-raising efforts) which may be used with some assurance of success and which require less in reporting costs because the required information is on the list; and they can utilize the mailing-list facilities of the Senate computer. Findings I, 24 and 37, pp. 15-18, 21; App. II-16-20, 23-24. Direct mail is also a time-consuming process which incumbents can generally begin earlier, using their offices as a base, while challengers are still seeking nomination. *Id.* I, 24, p. 16, App. II-16-20; Keene dep. tr. 14-15.

Appellees' evidence, moreover, is totally misleading, in that it aggregates *all* congressional elections without any regard to the enormous variances among such elections, and is thus virtually useless in analyzing *particular* campaigns. Appellants have compiled figures, Findings II, C 9, p. 257, App. II-679, on the amount of "overage"[5] in House races in which challengers to incumbents made a serious run and received 45 percent of the vote or more.

When closely contested campaigns are considered, it is clear that the viability[6] of many challengers is derived in large part from contributions which the FECA would prohibit. These figures, derived from Common Cause's statistics, Findings II, C 6, p. 249, App. II-665, demonstrate beyond any question the role large contributions can play in making challengers viable. In such races, incumbents start with cash on hand while challengers for the most part do not. Challengers also rely much more heavily than do incumbents on loans, which are not included in the aggregate figures. *Compare id.* II, A 52, 60,

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[5] "Overage" is defined as amounts received in contributions, including loans, in excess of $1,000 per individual and in excess of $5,000 per political committee.

[6] A particular campaign is considered politically "viable" if it is able to mount an effective (whether or not successful) challenge.

pp. 101-05, App. II-451-54, *with* II A 115, pp. 133-39; App. II-473-78. The amount of overage raised by challengers in these races is also greater. Finally, for those challengers who had total overage exeeding $3,000, the large contributions or loans were generally received earlier in the campaign than the overage received by the incumbents they faced, indicating that such early, large contributions performed the important function of "seed money."

"Seed money" or "up-front money" was defined by the Court of Appeals to be ". . . the critical mass of money to be applied at the outset of a campaign to establish a 'viable' candidacy. For a campaign that intends to rely upon small contributions solicited by direct mail, for example, the seed money would be the cost of an initial direct mailing and associated expenses" (op. at 1532 n.85). Appellees deny the validity of this definition and claim there is no evidence that seed money in large contributions is an essential component of a viable campaign. They are wrong.

In 1974, incumbent Senators seeking re-election had $1,402,083 in cash on hand on September 1, 1973. Challengers had $21,676, *id.* II, C 15, p. 268; App. II-697. In Senate races in which challengers received at least 45 percent of the vote, challengers had received 53.8 percent of their overage by October 1, 1974, while the incumbents had received only 31.8 percent of theirs by the same date. *Id.* II, C 6, p. 249; App. II-665.

In the 1974 House races in which challengers received 45 percent of the vote or more, incumbents had $398,097 cash on hand while challengers had $68,051 as of September 1, 1973, *id.* II, C 10, p. 267; App. II-697. If one excludes Rep. Price of Texas, an incumbent who borrowed and repaid $74,000, incumbents reported $66,913 in repaid loans, while challengers had $136,936. Incumbents had $110,798 in overage while challengers had $181,253. In the forty races in which challengers defeated an incumbent, incumbents had $72,723 in overage, while challengers had $110,894. Repaid loans are not included in the overage figures. *Id.* II, C 10-13, p. 267; App. II-697.

In the nineteen 1974 House races in which a challenger received over 45 percent of the vote and had over $3,000 in overage, 56.0 percent of that overage was on hand by October 1, 1974, and thus represented vitally necessary seed money, while incumbents had received only 35.5 percent by that date. In twelve of the nineteen contests in which the challengers won, 70.8 percent of the challengers' overage was received by October 1, while incumbents had only 44.7 percent. *Id.* II, C 6, p. 249; App. II-665.

Early money in contributions exceeding $1,000, therefore, is important to challengers in establishing viability. Indeed, it is well known in the political world that seed money plays a terribly important role for those challenging incumbents. Findings III, Buckley 11-23, pp. 3-7, App. II-701-02; Mahoney 5, p. 12, App. II-709; McCarthy 4-8, pp. 18-19, App. II-714-15; Wertheimer 2-5, pp. 45-46, App. II-737. Incumbents have high name recognition and other political advantages, *id.* I, 31-32, pp. 20-21; App. II-22-23. Additionally, incumbents have an entire term in office to raise money for the next campaign, and many of them are thus able to begin it with a substantial amount of cash on hand as well as the perquisites of office.

The court below recognized the need for seed money and, indeed, relied on this need to uphold the higher ceilings on personal and family expenditures.

Record evidence demonstrating the critical importance of "seed money" to challengers' campaigns show the following:

Julian Bond, 1975 Campaign for the Democratic Presidential Nomination

Bond is the first candidate for a party's 1976 presidential nomination to abandon his campaign. He did so explicitly because he was unable to raise seed money:

> "One candidate who thinks his inability to raise seed money is hurting his 1976 campaign is Julian Bond, the Georgia state senator who has said he wants to run in selected black districts to collect delegates for bargaining purposes at the Democratic convention. Atlanta City Council member James G. Bond, the candidate's brother and campaign manager, said in an interview that the limit on individual contributions 'is a disaster as far as our campaign is concerned. As a result of this law, Julian's probably not going to be able to run.'
>
> James Bond said that Morris Dees, the Democratic direct mail specialist who raised funds for George McGovern in 1972, 'told Julian he could raise several hundred thousand dollars if he could raise $20,000 to start. Several people said they were willing to lend it to him, but that's illegal.' He said that the requirement that candidates get their seed money in small contributions works hardest against people who represent poor constituencies. 'Julian's base is the black community, and it's not a rich community,' Bond said." Malbin, "New Campaign Finance Law Faces Legal, Political Tests," *National Journal Reports* (July 12, 1975), 1011, at 1018.

Thomas Bradley, 1973 Los Angeles Mayoralty Campaign

Bradley was victorious in the 1973 Los Angeles election for mayor. Max Palevsky stated under oath in the present case:

> "In 1973, I ran the campaign to elect Tom Bradley Mayor of Los Angeles. The records of the Bradley campaign show that of the approximately $1.5 million raised, virtually all of the critical early money came from large contributions in excess of $5,000. In the Bradley campaign the central issue, in my opinion, was electing a black in a city which is predominantly white. In order to deal with the fears and apprehension of some of the population, it was imperative that Mr. Bradley be seen as often as possible in the media. Mr. Bradley's constituency was not in an economic position to provide the funds needed for this effort. The funds could only be raised, in my opinion, from wealthy contributors. Of the initial half million dollars raised, over 85% came in contributions in excess of $1,000. Without these contributions, in my opinion, Mr. Bradley could never have won either the primary or the run-off election for mayor." Palvesky aff. § 7.

James L. Buckley, 1970 Senate Campaign

Buckley defeated an incumbent Senator, but he would not even have run had he not had assurances that at least $100,000 in seed money could be raised quickly. Findings III, Buckley 11-13, p. 3, App. II-701-02. The Buckley campaign began with a $50,000 loan from a personal friend. *Id.*, Buckley 14, p. 4, App. II-702.

The Buckley race is typical of the crucial importance of early large contributions, and the uses to which they are put. Sen. Buckley required a campaign headquarters and a telephone bank (for contacting voters). Because landlords and utilities in New York City require advance deposits, Sen. Buckley could not even begin his campaign without substantial sums of money, Findings III, Buckley 20-23, pp. 6-7; App. II-704-05. The District Court found that "[i]n

fact, the agents for the building in which Senator Buckley's campaign sought and finally rented space would not even talk to campaign officials unless they appeared with a certified check for the entire amount they desired," *id.*, Buckley 22, p. 6; App. II-704. The amounts involved were $18,000 for rent and security deposit for the headquarters and $18,000 in deposits for the telephone bank, *id.*

Much of the early $50,000 loan went into a direct-mail campaign that eventually raised $650,000. More than 40,000 persons contributed to the campaign, and 35 percent of those gave less than $20 apiece, *id.*, Buckley 17-18, p. 5; App. II-703. Without the early large contributions, however, Sen. Buckley believes that his campaign would have been doomed from the outset, much as his unsuccessful 1968 campaign was, *id.*, Buckley 15-16, 19, pp. 4-5; App. II-702-04.

Ramsey Clark, 1974 Senate Campaign

Clark, a well-known former Attorney General, publicly associated with a number of causes with substantial constituencies in New York State, relied entirely on contributions of $100 or less. He was able to raise "seed money" of between $12,000 to $15,000 from friends and acquaintances to launch his appeals for small contributions. His response on direct mail was between 5 and 7 percent, or considerably better than the normal 2 or 3 percent. Nevertheless, because he relied on small contributions he could not get money when it was needed, and could not even make a rough estimate as to how much would be available for the general-election budget until a month after the primary. The cost of raising money thus greatly reduced the amount that he had available for campaign purposes, Findings I, 182-90, pp. 180-83; App. II-260-62.

Indeed, Clark stated that Sen. Javits appeared to outspend him by a ratio of 3 to 2 when, in fact, because of the extra cost of raising small contributions, he was really outspent 2 to 1. Clark received only 38 percent of the vote. *Id.* I, 185, 191, pp. 181-83; App. II-261-62.

Walter D. Huddleston, 1972 Senate Campaign

The Huddleston campaign for Senator from Kentucky began with a $50,000 loan from the state party and a $200,000 bank loan. *Id.* II, B 17, p. 196; App. II-576. Huddleston was elected, in a race between two nonincumbents.

Eugene J. McCarthy, 1968 New Hampshire Presidential-Primary Campaign

Sen. McCarthy did unexpectedly well in the New Hampshire primary, and his performance was a major factor in causing an incumbent President not to run for reelection. Sen. McCarthy received at least $71,000 (when adjusted for inflation since 1968, the total is over $90,000) in contributions which would have been illegal under the FECA, Findings III, McCarthy 4, p. 18; App. II-714; *id.* I, 181, p. 179; App. 260.

George S. McGovern, 1972 Campaign for the Democratic Presidential Nomination

Sen. McGovern's ultimately successful campaign for the Democratic presidential nomination began with contributions totalling $28,813 as of January 1, 1971. Of that $27,813, $15,500 would have been illegal under the FECA. Between January 1, 1971 and February 1, 1972, Sen. McGovern would have lost a total of $468,811 (including Max Palevsky's guarantee of Frank Manckiewicz's $150,000 salary). Between February 1 and March 10, 1972, three days after the New Hampshire primary, Sen. McGovern would have lost another $152,000. Indeed, from the beginning of his campaign until three days after the New Hampshire primary, the FECA would have barred a total of $636,882 in contributions to Sen. McGovern. Since

direct-mail techniques require that much of the return in contributions must be plowed back into more mailings, these large contributions were critical to McGovern's early efforts, Palevsky aff. ¶¶ 2-4; App. I-87-89.

Charles McC. Mathias, 1974 Senate Campaign

Sen. Mathias, like Ramsey Clark, limited contributions to his campaign to $100 or less. However, he had $50,000 already on hand when he imposed this limitation and had already spent money on unspecified pre-campaign obligations. He was, moreover, a well-known and popular Senator with a high-name recognition and the other perquisites of incumbency, Findings I, 172-79, pp. 175-79; App. II-257-60.

Edmund S. Muskie, 1972 Presidential Campaign

Sen. Muskie's unsuccessful campaign for the Democratic presidential nomination began with contributions from 40 contributors totaling approximately $600,000. 33 *Cong. Q. Wkly. Rep.* 1239 (June 14, 1975).

What experience demonstrates, common sense confirms. Direct-mail campaigns are necessarily very expensive, and cannot begin without substantial seed money. One contact by a candidate with one voter using the mails costs 20 cents, Findings II, B 40, p. 200, App. II-580, and the initial returns from direct-mail fund raising are often small. Indeed, the total cost of raising campaign money in this fashion is stipulated to be around 40 percent of the total eventually raised. *Id.*, B 50, p. 203; App. II-582. If challengers cannot obtain large contributions initially, their campaigns are effectively strangled at birth. Appellees strenuously maintain that there is no evidence demonstrating the necessity for seed money. They have never, however, revealed where the money for initial mailing will come from. Far from closing the political system, large early contributions

are truly the "seeds" that enable candidacies to flourish and become viable.[7]

The seed-money phenomenon applies to referenda as well as partisan campaigns. Harold Willens, a member of the Board of Directors of appellee Common Cause, described how the funding of the campaign in favor of California Ballot Proposition 9 (a state law with contribution and expenditure limits similar to those contained in the FECA) was organized in 1974:

> "... I estimated we would need about four hundred thousand dollars. I then approached a number of people with whom I have worked and whom I have learned to respect and admire because their affluence is matched by their social concern. From this handful of people I got about forty thousand dollars which was our seed money, or start-up fund. We were then able, with this money, to do some other things that generated the rest of the money we needed." "The Campaign for Proposition 9," *The Center Magazine* (Nov.-Dec., 1974), at 43.

The experiences of current presidential candidates—except for the incumbent—demonstrate that the cost of raising small contributions is even higher than anticipated. As of July 20, 1975, Sen. Jackson had on hand 50 percent of the contributions he had raised. All other candidates had much less: Wallace 40 percent, Bentsen 33 percent, Udall 10 percent, Harris 4 percent, Carter 2 per-

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[7] The ABA Special Committee on Election Reform expressly declined to take a position regarding the appropriate amount of limitations on contributions. It did, however, believe that such limitations "... should be sufficiently high to permit meaningful expression of support ... " without allowing undue influence. ABA Report at 5. As the discussion in the text demonstrates, the FECA's limits are far too low to allow such a "meaningful expression of support."

cent, Sanford less than zero. *New York Times,* July 21, 1975, p. 10, col. 3. During this early stage of the campaign, virtually all expenditures are for fund raising.

Finally, limits on large contributions are highly discriminatory against minor parties and independent candidates. Appellant McCarthy, for example, is not permitted to receive federal funding on the rationale that his chances of winning are too insignificant for the government to waste its resources on him. He is, on the other hand, prohibited from receiving contributions in excess of $1,000 from individuals because his official decisions when in office might thereby be corrupted.

The $25,000 aggregate limit on individual contributions to candidates, 18 U.S.C. § 608(1) (3), is also likely to reduce the contributions available to third-party or independent candidates. Once the aggregate amount an individual can contribute is limited, donors are likely to want to make their limited contributions to major-party candidates with better chances of winning elections, and less likely to give them to third-party or independent candidates. McCarthy dep. tr. 101; Crane aff., ¶ 11B.

C. *The Limits on Incidental Expenses of Volunteers Violate the First Amendment.*

The FECA Amendments limit the expenses of volunteers by defining them either as a contribution or an expenditure, with a $500 exception for travel and certain other expenses, 18 U.S.C. § 591(e), (f). No provision of the FECA Amendments better typifies its repressive spirit than this. It starkly demonstrates the gross intrusion of this statute into the political activities of American citizens.

It applies to widely varied forms of typical political advocacy—the use of space in a house, the use of personal phones, travel by car, plane or train—and thus restrains all kinds of hitherto-commonplace First Amendment

activity—demonstrations, handbilling, doorbell ringing. See *Edwards* v. *South Carolina, supra; Talley* v. *California, supra.* The vistas of enforcement this provision opens are chilling. Individuals will be subjected to close audits of their personal finances because they have engaged in political activity unregulated before the FECA Amendments. Moreover, the possibilities of discriminatory enforcement (as with the enforcement of limits on independent expenditures) are endless.

Although personal services contributed by volunteers are exempted, 18 U.S.C. § 591(e)(5)(A), the effect is necessarily to reduce such services whenever some expenditure of money is connected with them. A lawyer contributing volunteer services to a Senate candidate in an effort to aid compliance with this statute might well have extensive phone bills, travel or office expenses. By limiting the expenses, the law limits the services. The limit, moreover, becomes more restrictive every day because it does not take inflation into account, *compare* 18 U.S.C. § 608(d). If Congress can do that, what kind of political activity can it not limit or forbid entirely? The limit on volunteer expenses is unconstitutional on its face.

D. *The FECA Limits on Contributions Discriminate Against Candidates Without Family Wealth in Violation of the First and Fifth Amendments.*

The limitations on contributions are likely to make it more difficult for individuals without personal or family wealth to run for office. A candidate for the House, for instance, who has personal wealth can contribute $25,000 to his own campaign, 18 U.S.C. § 608(a), thereby providing seed money. On the other hand, candidates without personal wealth are not permitted to raise individual contributions above $1,000. The result is that candidates from

wealthy families will have far greater advantages than at present.[10]

The court below suggested that the higher limits for family or personal expenditures are permissible because the chance of corruption is less in such cases (op. at 1533). Clearly, however, that is not the case, for history abounds with charges that the families of public officials have profited by their relationship.

The court also suggested that the personal expenditures could be used as "seed money" and that the number of individuals which constitutes a family is so large that "even a candidate in modest circumstances obtains the flexibility to raise useful sums . . ." (op. at 1533). Surely the court did not mean to suggest that only those candidates whose close relations can contribute $25,000 to $50,000 are entitled to raise seed money. Yet that is precisely the result of the statutory provisions and the Court of Appeals' rationale.

By distinguishing between what wealthy and non-wealthy candidates are permitted to do (*i.e.*, because the latter are barred from receiving contributions in excess of $1,000 from wealthy supporters) in terms of the exercise of First Amendment rights, the interrelationship of 18 U.S.C. § 608(a) and § 608(b) creates a clear discrimination based on wealth which impinges on interests expressly guaranteed by the Constitution. As such, they are unconstitutional. *Bullock* v. *Carter*, 405 U.S. 134 (1972); *cf. Harper* v. *Virginia Board of Elections*, 382 U.S. 663 (1966).

[10] The candidate-contribution limits for the Senate ($35,000) and the Presidency ($50,000) are greater than the $25,000 aggregate contribution limitation imposed on all other individuals, 18 U.S.C. § 608(b)(3).

E. *The Requirements for Becoming a Political Committee Which Can Contribute $5,000 to a Candidate Violate the First and Fifth Amendments.*

As in the case of limits on expenditures, the FECA makes distinctions between kinds of political committees. Political committees which have received contributions from more than fifty persons, and which have been registered for six months, are permitted to contribute to candidates up to $5,000 per election, 18 U.S.C. § 608(b)(2). The six-month limitation restricts the ability of citizens to engage in political activity which is important and timely. Interested groups and individuals will be unable to take advantage of the $5,000 limitation to respond to events occurring withing six months of an election if they have not previously organized or registered as a political committee. Important associational freedoms are thus severely restricted. Ad hoc organizations, for example, are greatly disadvantaged.

There is no reason having to do with notions of either corruption or political equality which justifies this kind of restriction on the timing of political activities, and the legislative history of the political-committee section reveals no justification. For all that appears, the statutory provisions are a deliberate measure to protect organized interest groups which have the means to support a national network of political committees on a continuing basis. For this among other reasons, organized economic interest groups have not viewed this legislation as in any way a threat to their interests. See *supra*, pp. 69-71. The state law upset in *Mills* v. *Alabama*, *supra*, which sought to prevent last-minute editorials to which an effective response could not be made, could be characterized as eminently sensible compared to this gross restriction on the timing of political speech. See also *Kusper* v. *Pontikes*, 414 U.S. 51 (1973), which held that a state may not "lock in" votes by

prohibiting persons from voting in the primary of one party until 23 months after they had voted in the primary of another party. The main effect of such a restriction, moreover, will be to increase the power of organized and established interests over other groups because such interests can more easily proliferate and maintain committees for the period required. Requiring contributions from more than fifty persons is also arbitrary, and unjustified by any evidence in the legislative history.

F. *The Limits on Contributions Violate the First and Fifth Amendments in That They Are Overbroad.*

The Constitution demands that regulation touching upon the sensitive areas protected by the First Amendment be precisely tailored and carefully related to the evil sought to be remedied. *Aptheker* v. *Secretary of State, supra; United States* v. *Robel, supra.* The limitations on contributions contains in the FECA are a frontal assault on this stricture.

The "corruption" rationale cannot meet the constitutional test when applied to legislation which forbids thousands of innocent, "pure speech" contributions for every one attempt at corruption which it may reach. See pp. 67-78, *supra.*

Moreover, the $1,000 and $5,000 contribution limitations apply no matter what office is being sought. Whether the goal is elimination of corruption or an increase in political equality, such limits make no sense in the case of campaigns for the Presidency or Senate races in large states. Candidates who must raise millions of dollars cannot be corrupted by contributions in these amounts. Where small states or House races are involved, $1,000 may or may not be a large sum depending on the total cost of the campaign. Neither appellees nor the court below has even attempted to rationalize the overall $1,000 limit.

The limitations, moreover, leave no room for any adjustment depending on the number of variables which affect the cost of elections, Findings I, 2-4, pp. 1-2; App. II-5-6. They are, moreover, getting smaller daily because of inflation. If $1,000 is in fact a rational point at which to limit contributions, its real impact should not be left to the vicissitudes of the economy. Yet Congress, while fully providing for cost-of-living adjustments to the expenditure limitations, 18 U.S.C. § 608(d), inexplicably failed to include any similar provision with respect to contributions.

The limitations on personal expenditures are thus pulled more from the air than from any kind of rational consideration of the cost of elections. The $35,000 limit on personal and family expenditures in Senate races, for example, is only $10,000 more than that permitted in House races, although the cost of some Senate elections may well be, even with spending limits, many times greater. So too, a limit of $50,000 in the case of the Presidency, with a spending limit of $20,000,000, is irrational when compared to the $25,000 limit on personal expenditures in House races, where the spending limit is $70,000. Where political rights are concerned, quantitative limitations established by the state must be related to a legitimate state interest rather than simply arbitrary figures arrived at in a random fashion. See *Kusper* v. *Pontikes, supra.*

Nor do the limits on contributions differentiate among donors. If, for example, there is concern that some groups are receiving subsidies from the government and then using those funds to lobby the government itself for more subsidies, precise provisions relating to political contributions by such groups might be upheld. See *United States Civil Service Commission* v. *National Association of Letter Carriers,* 413 U.S. 548 (1973). Similarly, if there is fear that people are buying federal offices through large contributions, the proper remedy lies in regulating contributions by appointed officials. The Senate, in the exercise of its advise-

and-consent power, could easily inquire into the political contributions of nominees for federal office, especially when aided by properly drafted disclosure requirements. If in its collective judgment the Senate believes a particular nominee has "bought" the nomination, it can simply refuse to confirm that nomination.

Nor do the limitations take differing recipients into account. Appellant McCarthy may not solicit contributions over $1,000 even though his major-party opponents in the presidential campaign will each receive $20,000,000 in federal funding. There is simply no way to justify denying him both federal funding *and* the right to solicit large contributions, particularly when the denial of federal funding rests on the legislative judgment that candidates like McCarthy have no chance of being elected.

Appellants have suggested, *supra*, pp. 75-78, a number of statutory schemes directed with precision at the kind of contributions which may legitimately be said to involve "non-speech" or improper elements. Neither appellees nor the court below have suggested why such measures are not fully adequate or why the broadside FECA approach is necessary. Rather, they have merely deferred to Congress' judgment. More is demanded where the First Amendment is at stake.

The best solution is disclosure of large contributions. The First Amendment means that political truth is a matter for individual decision in a free marketplace of ideas. *Abrams* v. *United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The FECA, on the other hand, reflects a distrust that voters, even when fully informed, will reject candidates who abuse campaign financing. The two approaches cannot stand together.

VI.

The Federal Subsidy Provisions Violate Article I, Section 8, and the First and Fifth Amendments to the Constitution.

A. *Funding Campaign Activities by Direct Payment to Candidates or Parties Is Unconstitutional.*

Direct government subsidies to candidates and parties are contrary to the "general welfare," U.S. Const., Art. I, § 8, because they reduce the amount of influence that citizens have over their representatives, and neuter the political process by eliminating an important means by which voters can express intensely held views on important public issues. None of the stated rationales for this legislation—the elimination of corruption, the reduction of election costs, or the diminishing of inequality of political resources—,even if fully demonstrated in the record, leads to the conclusion that candidates should be relieved of the need to raise campaign money. *Cf. Opinion of the Justices*, 197 N.E. 2d 691 (Mass. 1964); Note, Payment of State Funds to Political Party Committees for Use in Meeting Campaign Expenses Lacks a Public Purpose, 78 Harv. L. Rev. 1260, 1262-63 (1964). That result decreases political communication and political participation and relieves politicians of an important burden of their office.[1]

Grave dangers to the future of democratic government result from direct payments to parties and candidates. Democracy depends largely on free political competition and the freedom to form, join or leave political organizations. Once a party becomes officially sponsored by the government or government begins to determine the allocation of political resources, that freedom is endangered. See *Lemon* v. *Kurtzman*, 403 U.S. 602,621 (1971): "the history

[1] A decline in voter interest in party activities was one result of Puerto Rico's public subsidy program. Committee for Economic Development, Financing a Better Election System, 48 (1968).

of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance."[2]

First Amendment decisions dealing with the establishment and freedom of exercise of religion clauses are relevant by analogy here.[3] The First Amendment was designed to protect freedom of conscience, Freeman, "A Remonstrance for Conscience," 106 U. Pa. L. Rev. 806 (1958). As Thomas Jefferson said, in arguing against forcing citizens to support even ministers of their own religion:

> ". . . to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves and abhors, is sinful and tyranical . . . ." Padover, *The Complete Jefferson* 946 (1942).

As Madison, "the leading architect of the religion clauses of the First Amendment," *Flast* v. *Cohen*, 392 U.S. 83, 103 (1968), recognized:

> "In a free government the security for civil rights must be the same as that for religious rights. It consists in the one case in the multiplicity of sects. The degree of security in both cases will depend

[2] Sen. Gambrell in 1971 introduced an amendment that would provide public subsidies only for candidates whose party national committees were "fairly apportioned and selected by a democratic process." 117 Cong. Rec. S 18906 (daily ed. November 17, 1971). Sen. Hansen introduced an amendment, also defeated, that would bar subsidies to any candidate's party which failed to pay presidential campaign debts within five years after they are incurred. *Id.*, S 19139 (daily ed. November 19, 1971).

[3] The Court of Appeals states that "no one has ever seriously argued" that these prohibitions apply to freedom of speech or association (op. at 1560-61 n. 147). But of course no scheme to establish political parties has ever been enacted before.

> on the number of interests and sects . . . ." *The Federalist*, No. 51 (Cooke ed. 1961), pp. 351-52.

See *Everson* v. *Board of Education*, 330 U.S. 1 (1947); *Cantwell* v. *Connecticut*, 310 U.S. 296, 310 (1940); *Thomas* v. *Collins*, *supra*, at 531; *NAACP* v. *Alabama*, *supra*, at 461.

In 1784-85, the Virginia assembly considered a tax check-off scheme analogous to Subtitle H, though with voluntary features absent here. "That bill levied a tax for the support of Christian churches, leaving to each taxpayer the choice as to 'what society of Christians' he wanted the tax paid." *Walz* v. *Tax Commission*, 397 U.S. 664, 704 (1970) (Douglas, J., dissenting). By his "Memorial and Remonstrance Against Religious Assessments," Madison was able to defeat the proposal. Madison wrote:

> ". . . the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever." *Id.* at 721.

Madison thus recognized the dangers inherent even in a so-called "voluntary" tax-designation system. He further noted:

> ". . . it is proper to take alarm at the first experiment on our liberties . . . . The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. *They saw all the consequences in the principle, and they avoided the consequences by denying the principle.*" *Id.* (Emphasis added.)

The establishment clause and the free-exercise clause are closely related, *Zorach* v. *Clauson*, 343 U.S. 306 (1952).

Just as the establishment of a religion or religions upsets the marketplace of religious ideas, the establishment of a political party or parties interferes in the political marketplace and infringes the free exercise of political beliefs. *Cf. Lemon* v. *Kurtzman, supra,* at 628.

In the establishment-clause cases, three requirements must be met before legislation will pass constitutional muster: (1) the legislative purpose must be primarily nonsectarian; (2) the principal effect must be neither to advance nor to inhibit particular organizations or movements; and (3) excessive entanglement in religious affairs must be avoided. *Meek* v. *Pittenger,* 43 U.S.L.W. 4596 (May 19, 1975); *Abington School District* v. *Schempp,* 374 U.S. 203 (1963). By analogy Subtitle H meets none of these tests. (1) Its plain purpose is political. (2) It clearly advances some and inhibits other political movements, see *infra,* pp. 152-64. (3) It not only involves but actually demands excessive government entanglement in political affairs.

(1) Subtitle H's prime purpose is neither nonpartisan nor apolitical but in fact the direct financing of certain political activities and certain political organizations. Indeed, there is no nonpartisan, apolitical rationale to justify relieving political candidates or parties from having to raise funds. Neither excessive spending, fear of corruption nor desire to reduce political inequality justifies direct financing of political parties and political candidates.

The priorities establishing Subtitle H, according to which the available funds are to be distributed, demonstrate its partisan and political ends. First are the national nominating conventions; second, general-election party candidacies; finally, matching grants to individuals seeking a nomination by traditional party routes. I.R.C. §§ 9008(a), 9037(a). The supports of organized party activities was clearly uppermost in the minds of Congress. Independent candidates such as appellant McCarthy are excluded.

Throughout Subtitle H there are continued references to political parties. The very term "candidate" is defined as "the candidate of a political party." I.R.C. § 9002(2)(B). Similarly, to be eligible for matching grants one must be a candidate seeking nomination by a political party. I.R.C. § 9033(b)(2). In the other parts of the statute, which place restrictions on candidates rather than conferring benefits upon them, candidates are defined broadly as individuals seeking nomination or election. 2 U.S.C. § 431(b); 18 U.S.C. § 591(b).

(2) Subtitle H inhibits and discriminates among various parties and candidates, a point discussed *infra,* pp. 152-69, as an independent ground of unconstitutionality. It should be noted here, however, that direct grants to parties or candidates necessarily involve allocative formulas, but *no* formula can ever be fair to everyone. Under every formula, some candidates or parties will be relieved of the burden of raising funds while others competing with them will continue to sustain that burden. And the government will have in effect declared to the voter that some parties are more worthy of adherence than their competitors, and that some are so unimportant as to be ignored.

(3) Direct subsidies necessarily involve excessive entanglement. They necessitate an annual or biennial struggle in Congress as to the allocation of political resources among political groups. There are simply no standards to guide such a debate other than self-interest. *Cf. Meeks* v. *Pittenger, supra,* at 4603. Congress will thus continuously debate the question of who is to have what political power. Subtitle H presently allocates $20,000,000

to each major-party candidate, a result reached when the Presidency and Congress were controlled by different political parties. Were the nation to elect a President with a large majority of his own party in the Congress, a new formula basing allocations to major parties on past performance might be enacted, just as Subtitle H bases the allocation to minor or new parties on past performance.[4]

Other forms of wholly undesirable entanglement will occur. The statute permits party committees to spend 2¢ per voter aiding some congressional candidates. 18 U.S.C. § 608(f)(3). Those party committees may well avoid supporting candidates challenging members of Congress with particular power over federal funding legislation, such as committee chairmen.

Entanglement is increased by other provisions, which are essential to the entire scheme, for the continual auditing of committees and candidates. 2 U.S.C. § 438(a)(8); I.R.C. §§ 9007(a), 9008(g), 9038(a). Furthermore, the FEC and incumbent Presidents (through the Secretary of the Treasury) are empowered to exercise discretion as to the allocation of funds among the various categories mentioned in terms of priorities and as to disbursements of matching-grant money to candidates for nomination of their own or another party. I.R.C. §§ 9004(a)(3), 9006(d), 9008(a), 9037(a), (b).

[4] "Major" parties are defined as those parties which in the preceding presidential election received 25 percent or more of the total number of popular votes cast. I.R.C. § 9002(6). "Minor" parties are defined as those parties which in the preceding presidential election received 5 percent or more but less than 25 percent of the total number of popular votes cast. *Id.*, § 9002(7). "New" parties are defined as those parties which are neither major nor minor parties. *Id.*, § 9002(8). The term "new" party thus includes not only parties created since the last election, but also all other third parties which received less than 5 percent of the vote in the preceding election.

If the exercise of political rights is to be kept free from government pressure, the courts must strike down any direct subsidizing of political parties or candidates. Otherwise, government by the people would be in grave danger of becoming government by the government.

While no one quarrels with the necessity of effective action against corruption, it does not follow that it is in the "general welfare" to relieve candidates from the need to raise private money. For example, many of the difficulties created by Subtitle H, see *infra*, pp. 152-69, can be avoided by a "voucher" scheme. See, *e.g.*, S. 1390, 94th Cong., 1st Sess. (1975). A voucher system places the subsidy money directly in the hands of the taxpayers—to be distributed as they see fit—and allows a large number of individuals to make small contributions. Candidates would have to attract these funds by addressing issues of importance to the citizens, rather than receiving them automatically from the government or through a matching-grant system. The court below felt Congress could properly provide "some choice . . . without going all the way to permit each taxpayer complete authority over the disposition of his dollar . . . " (op. at 1561-62). But choice is the essence of democracy, and if Congress is to use tax money at all, maximization of citizen choice is an appropriate safeguard.

A "voucher" scheme would not necessarily clearly pass constitutional muster or be a panacea. However, no reason for the public financing of elections justifies Congress' choosing the alternative it did, which is in fact the *most* intrusive means. As Sen. Baker wisely remarked, "there is something politically incestuous about the Government financing and, I believe, inevitably then regulating, the day-to-day procedures by which the Government is selected." 120 *Cong. Rec.* S 4457 (daily ed. March 26, 1974).[5] A

[5] Indeed, five of the seven members of the Senate Select Committee on Watergate voted *against* federal subsidies. 120 Cong. Rec. S 4560 (daily ed. March 27, 1974); *id.* S 4708 (daily ed. March 28, 1974).

"voucher" plan also easily avoids the discrimination against minor and new parties and independent candidates which Subtitle H embodies, and which we now discuss.

B. *Chapter 95 Violates the First and Fifth Amendments Because It Discriminates Against Minor and New Parties and Independent Candidates.*

Chapter 95 of Subtitle H, which establishes a system of federal subsidies for candidates in presidential general elections,[6] favors the Republican and Democratic parties while operating in a discriminatory and to some extent random fashion with respect to all others. New parties and independent candidates are severely disadvantaged when they begin their existence and most need financial support.[7] A third party which passes the statutory threshold, on the other hand, may be artificially preserved after its actual voter support has dissipated. For all of the elaborate definitions of "major," "minor," and "new" parties, the stark fact remains that in 1976 *only* the Democratic and Republican parties will receive *any* pre-election funding.

The discriminatory provisions include the following:

(1) Most grievous is the use of prior-vote criteria to determine the level of federal funding in general elections.[8] A four-year-old performance record bears no necessary rela-

[6] See pp. 10-12, *supra*, for a description of its provisions.

[7] As Senator Brock said, had the challenged statutes been in effect at the time of the emergence of the Republican Party, "the grave of Abraham Lincoln would have been just another burial plot in the cemetery." 120 *Cong. Rec.* S 4552 (daily ed. March 27, 1974).

[8] A Colorado statute enacted in 1909 granting parties funds in proportion to their voting strength was declared unconstitutional by that state's Supreme Court. McDonald v. Galligan, Col. Sup. Ct. 1910 (unreported), described in Merriam and Overacker, Primary Elections 306 (1928).

tionship to current strength.[9] Such a formula irrationally overcompensates declining parties and undercompensates those on the rise. See Rosenthal, "Campaign Financing," *supra*, at 412. George Wallace would have received nothing in 1968, while John Schmitz would have received $6.3 million in 1972, had Chapter 95 been law in those years (op. at 1606, dissent).

Prior-performance criteria make qualification and an entitlement determination for major parties simultaneous: achieving 25 percent of the vote entitles the party both to future subsidization *and* receipt of the maximum amount. Minor parties upon qualification receive an entitlement based on their past performance in relation to an "average major party vote" standard, although major parties receive the full $20 million entitlement regardless of their comparative performance. *Compare* I.R.C. § 9004(a)(1) *with* § 9004(a)(2) and (a)(3). A party with only 25.1 percent of the vote at the last election receives the full entitlement, even though it may be slipping into an even greater decline; a minor party which increases its strength in the interim will obtain financial recognition only after the next election.[10] There are bizarre results if Party A won

[9] The ABA's Special Committee on Election Reform stated "[f]unding should be determined on the basis of current voter support. Although past support at the polls is a proper method of recognizing established major and minor parties, *the ability of new parties and independents to gain support would be hampered by a process that may lock the system into the status quo.*" (Emphasis added.) ABA Report at 6.

[10] If one of the two major parties is deeply divided at its convention and splits into separate wings each fielding a candidate, those two candidates might each receive less than 25 percent of the vote. The other, united major party might obtain the rest of the popular vote, leaving under the statutory definition *only one major party*. In the next election the operation of Subtitle H would be such as to increase the likelihood that the country would be left permanently with a one-party system. In 1912, the Progressive (Bull Moose) Party received 27.4 per-

(Continued)

50 percent of the prior vote, Party B 25.1 percent and Party C 24.9 percent. Parties A and B receive $20 million each, and Party C receives $13.3 million.[11] No conceivable justification appears for the discrimination in favor of Party B and against Party C.

(2) Major-party candidates are entitled to receive the full subsidy, and minor-party candidates their partial subsidy, well prior to the November election, I.R.C. §§ 9003-9006. New parties and independents, however, receive nothing until *after* that election, *id.*[12] They have *no* alterna-

[10] (continued)
cent of the vote and the Republican Party 23.2 percent. The Progressives, although not an ongoing party in any major sense, would under Subtitle H have been entitled to the full major-party allotment for the 1916 election, while the Republican Party would have been relegated to minor-party status. Had Wilson drawn slightly more votes away from the Bull Moosers, only the Democratic Party would have been a major party under Chapter 95 in the 1916 election.

In addition, one of the two major parties has been close to the 25-percent cutoff point on two other occasions. In 1860 the Democratic candidate (Stephen A. Douglas) received only 29.4 percent of the popular vote, and in 1924 the Democratic candidate (John W. Davis) received only 28.4 percent. Only a very small voting shift in either of those years would have consigned the Democrats to minor-party status under Chapter 95.

[11] The $13.3 million figure is derived as follows: The percentage of the votes of Parties A and B are averaged to create the "average major party vote" (here 37.5%). Then, it is determined what percent of the average major party vote is the vote received by Party C (37.5% divided by 24.9%). The resulting percentage (here 66.4%) is then multiplied by the amounts received by Parties A and B ($20 million) to arrive at the $13.3 million figure to which C is entitled.

[12] Indeed, it may well be that unless their contributions come in the form of loans, new parties and independents are conceivably not entitled to *any* reimbursement after the election. A careful reading of I.R.C. §§ 9003(c) (2) and 9004(b) (1) indicates that post-election pay-
(continued)

tive by which they can demonstrate current popular support, a disability that is simply not rational. Schwartz, *Public Financing of Elections: A Constitutional Division of the Wealth* 64 (1975). They are thus forced to divert people and resources into fund raising during the campaign, while major parties face no similar burden. The post-election subsidy is a very poor—indeed almost no—substitute for pre-election payments.[13] *Cf. Williams* v. *Rhodes, supra,* at 32. Struggling parties have a greater need for, and more difficulty obtaining, money than do established parties. Indeed, these difficulties are aggravated by FECA's contribution limits, see Note, Developments in the Law—Elections, 88 Harv. L. Rev. 1111, 1269 (1975). If such parties do not receive money before the election, paying them afterwards will achieve nothing.[14]

(3) Any general-election candidate on the ballot in fewer than ten states receives no federal funding, I.R.C. § 9002(2)(B). This obviously damages any party lacking funds for getting on the ballot in ten or more states but which nevertheless hopes to exert influence either by taking

[12] (continued)
ments to new parties and to minor parties can be made only to defray campaign expenses which have not been paid for by contributions, unless such contributions were loans.

Since the terms "loan" and "contribution" are nowhere defined in Subtitle H (and since the only analogous definition, 18 U.S.C. § 591 (e), includes loans *within* the definition of contribution), it appears that new parties and minor parties which increase their popular vote are faced with a dilemma. Either they must raise contributions primarily in the form of loans, or they must forego post-election subsidies.

[13] Moreover, a new party failing to win 5 percent of the vote receives no subsidy; a subsidized party failing to meet the same standard is not required to pay funds back, I.R.C. § 9007(b).

[14] The ABA Special Committee on Election Reform stated that "[f]unds should be made available to all candidates and parties simultaneously before the election." ABA Report at 6. Adamany and Agree, *supra,* at 148, strongly concur.

the electoral votes of a few states or by affecting the results in those states. It is a classic means of influencing policy for minor parties or independent candidates to play a "balance of power" role.[15] Chapter 95 ignores, and discriminates against, this legitimate means of pursuing political goals and deprives of any federal funding parties hoping to play such a role. *Cf. Anderson* v. *United States*, 417 U.S. 211, 227 (1974).

The ten-state requirement has no rational relationship with a candidate's chances of success in the electoral college. There is no requirement that the ten states have a significant number of electoral votes. Thus, assuming all other conditions were met, a candidate on the ballots of the ten smallest states (which have a total of 34 electoral votes) would receive federal subsidies, but a candidate on the ballots of the nine largest states (which have a total of 245 electoral votes) would not. Schwartz, *supra*, at 62.

(4) Excluding from funding parties receiving less than 5 percent of the vote also equates seriousness of purpose with the ability to win, an approach which ignores the roles of third parties in our history. Such parties and independents often desire to influence the political process not by winning presidential elections but by affecting the public debate. Such was the strategy of both Henry A. Wallace and J. Strom Thurmond in 1948, and inspired the candidacies of Eugene V. Debs in 1908, 1912, and 1920. Yet Chapter 95 studiously denigrates the serious contributions of such campaigns to the national political debate.[16]

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[15] In the elections of 1836, 1844, 1884 and 1916, "a change in the outcome in one state would have given the election to the losing candidate," Schwartz, *supra*, at 59.

[16] With respect to points 3 and 4 in the text, the ABA Special Committee on Election Reform stated "[t]he role of minor parties should be recognized as a role distinct from that of major parties and (continued)

It cannot be overemphasized that at stake in the allocation of federal subsidies is the ability of the candidate and his supporters to carry their views to the electorate. Under Chapter 95, minor parties, new parties, and independents bear an even more onerous burden in convincing voters that they are serious contenders than they have previously—a burden vastly aggravated, moreover, by the new contribution limitations. Chapter 95 thus "tend[s] to silence one of the nation's most fruitful sources of new ideas." Rosenthal, "Campaign Financing," *supra*, at 413.

This Court has made clear that legislators may not lock in the two major parties by excluding all competition from new or minor parties. *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957); *Williams* v. *Rhodes*, 393 U.S. 23 (1968). As the Court said in *Sweezy*:

> "[a]ll political ideas cannot and should not be channeled into the programs of our two major parties. History has amply proved the virtue of political activity by minority, dissident groups, who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted." *Id.* at 250-51.

The courts below cited the ballot-access cases as support for sustaining Chapter 95 (op. at 1563-65). Those cases consider three state interests that might justify discrimination against minor parties. *Storer* v. *Brown*, 415 U.S. 724, 729 (1974). One—the avoidance of voter con-

[16] (continued)
legislation should not serve so as to measure minor parties by the standards applicable to major parties. Thus any system of public funding should recognize that the role of the minor parties, at least with respect to presidential elections, is to affect the election and the views of the voters. Ultimate success of the minor parties should not be the primary governing element in their treatment in a public funding system." ABA Report, at 6.

fusion by "providing the electorate with an understandable ballot," *id.* at 729—is certainly not present in this case.

The others—"encouraging compromise and political stability" and "attempting to ensure that the election winner will represent a majority of the community," *id.* —appear designed to limit ballot access to candidates likely to garner a significant level of support, *id.* at 732. These criteria thus reflect a judicial recognition that states may condition ballot-access requirements on the expected ultimate results of an election—the popular-vote totals candidates receive—so that candidates in whom the voters are more interested will be on the ballot.

Chapter 95, however, impinges on the very process by which the voters become interested and ultimate election results are obtained—communication with and persuasion of the voters. Subtitle H is thus a clear intrusion into the "robust" debate at the heart of the First Amendment, and not merely a narrowly drawn "time, place or manner" restriction on how the results of that debate are registered, as are the ballot-access requirements. As Prof. Rosenthal has said regarding the effective exclusion of third parties from federal subsidies: "It's worse not to have money than it is not to be on the ballot, because [while] write-in candidates sometimes get in, unfinanced candidates never get in." ABA Special Committee on Election Reform, Symposium, *supra*, 258 (1975).

Chapter 95 involves funding of the underlying political debate. As this Court said in *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974), legitimate governmental interests "must be achieved by a means that does not unfairly or unnecessarily burden either a minority party's or an individual candidate's equally important interest in the continued availability of political opportunity." It is, however, precisely on the "continued availability of political opportunity" that Chapter 95 has its most drastic impact. It

emasculates voter choice by altering the level of political debate in favor of the two major parties. As one commentator put it ". . . if money is needed to obtain votes, and the votes obtained determine how much money one gets, the system seems inescapably reminiscent of Catch-22." Rosenthal, "Campaign Financing," *supra*, at 414.

To the extent the ballot-access cases are relevant, they support appellants' position. In *Jenness* v. *Fortson*, 403 U.S. 431 (1971), the goal of the prospective candidate-plaintiffs was to obtain a position on Georgia's general-election ballot. Under Chapter 95 the candidate's goal is to obtain the general-election federal subsidy at a time when he can use it to advance his candidacy. Under the statute at issue in *Jenness* v. *Fortson*, *supra*, there were two alternative routes to reach the goal. If a prospective candidate wished to obtain the benefit of automatic ballot placement, he had to incur the burden of seeking the nomination of a party entitled to such automatic placement, thus risking a primary fight for that nomination. If, on the other hand, a prospective candidate wished to obtain the benefit of remaining independent of the established parties, he had to incur the burden of a petition drive that would accumulate the signatures of 5 percent of the total eligible electorate. Prospective candidates under either route thus had an opportunity to reach the goal of a position on Georgia's general-election ballot, "neither . . . [of which could] be assumed to be inherently more burdensome than the other." *Id.* at 441.

Under Chapter 95, there is only one route by which a prospective candidate can reach the goal of obtaining general-election federal subsidy money before the November election—the only time at which it can possibly assist his candidacy. If a candidate wishes to obtain the benefit of such subsidy money in the amount of $20,000,000, he must incur the burden of seeking the nomination of a party entitled to the automatic payments. If, on the other hand, a candidate wishes to obtain the benefit of remaining inde-

pendent of the major parties, there is no corresponding burden he can choose to incur in order to obtain the benefit of automatic subsidy money in the amount of $20,000,000 available before the November election. He is simply denied federal subsidies altogether until after the election, and even then he is not guaranteed the full $20,000,000 but only an amount based on the ratio of his vote to that of the major-party candidates, and nothing at all if his vote is less than 5 percent. I.R.C. § 9004(a).

The courts below confused the goals at stake in the ballot-access cases and under Subtitle H with the benefits and burdens of seeking the nomination of a major party or running outside of them. They thus misconstrued the import of *Jenness* v. *Fortson*, *supra*, and other ballot-access cases, *Storer* v. *Brown* 415 U.S. 724 (1974); *American Party of Texas* v. *White*, 415 U.S. 767 (1974). Although under Chapter 95 a new-party or independent candidate may obtain some federal funding (less than $20,000,000) at some time (after rather than before the election), his candidacy is necessarily less viable because he can *never* achieve the goal above stated. Accordingly, in a self-fulfilling prophecy, the candidate will attract less support and in fact almost certainly will never obtain even the partial funding Chapter 95 purports to offer.

The *coup de grace* is administered by contribution limits, which make it more difficult for new and minor parties to raise private funds and thus to compete with their publicly funded opponents.[17] Thus, the totality of the

[17] The ACLU has stated regarding Chapter 95 "[i]t is easy to see how this provision of the FECA reinforces the status quo. It means that we are taxed to support the perpetuation of only established points of view. The American Independent Party . . . cannot get public funds in 1976. A candidate such as Norman Thomas in the 1930s and the 1940s would not only have to campaign against existing orthodoxies. He would have to do it at the expense of private contributors who were also

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invidiously discriminatory burden on protected rights created by the contribution limits and federal subsidy provisions weigh heavily against their constitutionality. *Williams* v. *Rhodes*, *supra*, at 34. Far from benefiting third parties, contribution limits are far more detrimental to challengers, see *supra*, pp. 127-38, than to incumbents. Providing the major parties with full campaign funding at the outset of the campaign compounds the injury still further.

That Congress had little use for third parties is made clear by the Senate report which, in defending Subtitle H, said that a proliferation of "splinter parties" and independent candidates "would undermine the stability provided by a strong two party system and could polarize voters on the basis of a single volatile issue." S. Rep. No. 93-689, *supra*, at 8.[18]

Rep. Conyers, who voted for final passage of the bill, argued that the 5-percent popular-vote threshold requirement for new and minor parties would preclude them from getting started. Rep. Hays replied, "I personally would like to do anything I can to protect the two party system . . . ." 120 *Cong. Rec.* H 7808 (daily ed. August 7, 1974). The bill as passed demonstrates clearly how successful Rep. Hays and his like-minded colleagues were.

[17] (continued)
taxed to support the candidates they opposed while no tax money would have gone to Thomas. These contributors to Thomas would have been limited to $1,000 and their identities would have been disclosed to the government." ACLU Report at 25.

[18] The legal and political experience of other nations subsidizing political activity demonstrates the contrary. Public subsidies to parties were introduced in Germany with only those parties then represented in the national and local Parliaments receiving public funds. The German Constitutional Court declared the subsidies invalid, holding that the constitution mandated a "free and open process of opinion and will

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Rep. Conyers' amendment to delete the 5-percent threshold, and to allocate subsidies to new and minor parties and independent candidates solely on the basis of the popular vote the candidate received, was defeated in an unrecorded vote, *id.*, H 7919. Rep. Hays, opposing the Conyers amendment, stated that the 5-percent figure was "arbitrary," an unchallenged characterization, *id.*, H 7916-17. Rep. Frenzel concurred that "we have never been able to establish a matching formula that would do justice to new parties and third parties or independent parties," *id.*, H 7916. The final legislative product amply confirms the judgment of Reps. Hays and Frenzel.

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[18] (continued)
formation leading from the people to the organs of the state, not in the reverse direction," and defining the parties as "free competing groups acting on their own behalf and independently of the state." Quoted in Heidenheimer, ed., *Camparative Political Finance*. 45 (1970).

In response, the German parties agreed on a plan that would allow subsidization of campaign expenditures. After yet another court challenge, the threshold requirement was lowered to 0.5 percent of the total popular vote.

The present German law thus contains a threshold requirement *one-tenth* the size of that contained in Subtitle H. Moreover, Germany presently enjoys, as it has since World War II, a stable "two and one-half party" system, and does not appear in danger of proliferation of parties. See generally, Schleth and Pinto-Duschinsky, "Why Public Subsidies Have Become the Major Sources of Party Funds in West Germany, but Not in Great Britain," in Heidenheimer, *supra*, at 23-49.

Scholars examining other public-subsidy schemes uniformly believe that they entrench the established parties. This entrenchment has been found in Scandinavian countries: Andren, "Partisan Motivation and Concern for System Legitimacy in the Scandinavian Deliberations on Public Subsidies," *id.* at 50-67; Canada: Paltiel, "Contrasts Among the Several Canadian Political Finance Cultures," *id.*, 119-30; Puerto Rico: Anderson, Party Politics in Puerto Rico, 28-29 (1965); and Italy: Sassoon, "The Funding of Political Parties in Italy," 46 The Political Quarterly 94 (1974).

The major-party bias permeating Subtitle H was clearly demonstrated by the debate over the tax "checkoff" provision, I.R.C. § 6096. In response to Sen. Mathias' proposal that taxpayers be allowed to designate their choice of candidates or parties, Sen. Pastore replied, "That would not be fair. What we are trying to do is to give both sides the same amount of money . . . ." 117 *Cong. Rec.* S 18891 (daily ed. November 17, 1971).

In a remarkable statement, Sen. Long further argued that his amendment preventing taxpayer designation of parties would "quit confusing people. Rather than saying both Democrats or Republicans are the party of one's choice, the taxpayer just makes a check on the tax return. . . ." 119 *Cong. Rec.* S 12196 (daily ed. June 27, 1973).

Although it is uncertain whether or not a tax checkoff system that would allow taxpayers to designate their choice of candidates or parties would be permissible, it would certainly be far less discriminatory than the present system. So would the voucher proposal; see Brief of Sen. Metcalf as *amicus curiae*. Either of these devices would ensure that subsidies were allocated in accordance with current voter support rather than with arbitrary and discriminatory percentage cut-offs and irrelevant past achievements. Such means would be better indicators of present popular support and would thereby be less destructive of First and Fifth Amendment values. Those values therefore dictate that the more intrusive means represented by Chapter 95 be stricken.

Chapter 95 clearly gives "the two old, established parties a decided advantage over any new parties struggling for existence and thus places substantially unequal burdens on both the right to vote and the right to associate," *Williams* v. *Rhodes*, *supra*, 393 U.S. at 31. See Barrow, "Regulation of Campaign Funding and Spending for Federal Office," 5 Mich. J.L. Reform 159, 187-89 (1972).

Although one of the rationales for this legislation was the diminution of the power of "special interests," two such interests have carried the day with Chapter 95—the Democratic and Republican parties. There can be no compelling governmental interest in distorting the substantive political debate in such an invidiously discriminatory fashion.

C. *Chapter 96 Violates the First and Fifth Amendments Because It Discriminates Against Certain Candidates.*

Chapter 96 establishes a system of federal funding for candidates for party presidential nominations, imposing what the Court of Appeals termed "stringent threshold requirements" for eligibility (op. at 1527). See pp. 11-12, *supra*, for a description of these provisions.

A key requirement of eligibility for payments is that a presidential candidate "is seeking nomination by a political party," I.R.C. § 9033(1), (2). Moreover, candidates must be participating in "primary elections," a term specifically defined to be an event or series of events "held by a political party," *id.*, § 9032 (7). Chapter 96 thus deprives of substantial rights all candidates, and particularly independent candidates such as appellant McCarthy, who achieve a place on ballots by petition rather than by party nomination. Obtaining ballot status in the various states requires extensive expenditures of funds,[19] whether the route be by petition or otherwise. Because Chapter 96 denies *any* money to candidates who choose that route rather than the party nomination route, it discriminates invidiously against them. *Storer* v. *Brown*, *supra*, at 746.

[19] Leaders of George Wallace's 1968 presidential campaign estimated that the organizational and legal efforts to get Wallace on the ballot in 50 states cost $3 million. Findings I, 42, p. 23; App. II-25.

The courts below ignored the fact that under the ballot-access cases independent candidates at least had an opportunity to place their names on the ballot, albeit by a different method than those obtaining party nominations. Chapter 96 provides no such alternative route. It flatly prohibits independent candidates from ever obtaining any federal subsidy money under any circumstances. There is no way that such discrimination can be constitutionally justified.

Characterizing the effects of denying funds to independents as "incidental," as did the Court of Appeals (op. at 1568), drastically understates the advantages that the major parties gain. Moreover, the Court of Appeals implied that independents *should* be eligible for general-election subsidies (op. at 1569-70), yet it gave no reason why the logic of that implication does not also apply to subsidies under Chapter 96.

American Party of Texas v. *White*, 415 U.S. 767 (1974), relied on below, is completely inapposite. First, the primary expenses defrayed by Texas were not the costs of *campaigning*, but the costs of the *mechanics* of primary-day ballot machines, ballot counting, etc. Second, Texas simply took a slightly different route to funding election-day expenses than other states, which meet such expenses out of general tax revenues. Upholding Chapter 96 on the basis of *American Party* is like saying that because the federal government pays for the upkeep of Lafayette Park, it may also defray the costs of organizing, publicizing, and holding some (but not all) of the demonstrations and rallies that occur there.

The matching-grant formula further discriminates unconstitutionally by requiring applicants for matching funds to become eligible by raising $100,000 in contributions of $250 or less, in 20 states, not exceeding $5,000 per state, I.R.C. § 9033(b) (3) and (4). This formula has no rela-

tionship whatsoever to the manner in which candidates are nominated or elected to the Presidency. Such a requirement discriminates against a candidate with very substantial regional backing who is denied the opportunity to expand his support because of the lack of matching grants. It is, moreover, in flat conflict with *Moore* v. *Ogilvie*, 394 U.S. 814 (1969), which held unconstitutional an Illinois statute requiring independent nominating petitions to contain 25,000 signatures, including 200 each from 50 of the state's 102 counties.

The Court of Appeals' statement that the "20-state requirement simply reflects the realities of Presidential campaigning" (op. at 1568) is unsound.[20] Presidential candidates win by obtaining a majority of the electoral vote, not by winning in a majority of the states. Chapter 96 is even more burdensome, and, if anything, less rational than the Illinois statute in *Moore*. The states obviously are not equal in their electoral vote, but they are treated equally (and irrationally) by Chapter 96, just as the Illinois' statute in *Moore* treated the state's counties equally for purposes of nominating petitions. New York and California are considered no differently than Nevada and Alaska[21] under Chapter 96's presidential-candidate licensing system.[22]

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[20] The electoral votes of the 20 smallest states do not constitute a majority of the electoral college, Findings I, 52, p. 25; App. II-26.

[21] New York and California together have more electoral votes than the twenty smallest states combined, Findings I, 50, p. 24, App. II-26, and twice as many voters as the 20 smallest states combined, *id.* I, 49, p. 24; App. II-26.

[22] The 20-state requirement also discriminates against "favorite son" candidates, especially governors, who begin with a narrow regional candidacy, but attempt to expand it as the nomination nears. Such candidacies will die aborning under Chapter 96. See Adamany and Agree, *supra*, at 149.

Chapter 96 is, moreover, analogous to the filing-fee requirement stricken down in *Bullock* v. *Carter*, 405 U.S. 134 (1972), and *Lubin* v. *Panish*, *supra*. As succinctly summarized by one commentator, the vice of matching-grant formulae is that they "rely on a wealth criterion in order to determine eligibility." Fleishman, "The FECA of 1971," *supra*, at 405. Moreover, wealth is the *only* criterion by which matching grant funds can be obtained—*no* other alternative is available. Eligibility should be based on popular support, not wealth, if Chapter 96 is to be even minimally consistent with the rest of the challenged legislation.[23]

The formula is almost openly designed to increase the power of "special interests" and the wealthy. For example, a candidate supported by organizations having affiliates nation-wide would clearly be in a better position to garner the necessary private funds than would be a candidate without such ties. The matching grant device also gives wealthy people a considerable advantage,[24] and is clearly discriminatory, *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966); *Bullock* v. *Carter*, 405 U.S. 134 (1972). A wealthy couple can contribute $500 and deduct $200 from

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[23] In Georgia Socialist Workers Party v. Fortson, 315 F. Supp. 1035, 1041 (N.D.Ga. 1970) *aff'd on other grounds sub nom.* Jenness v. Fortson, *supra*, the trial court said: "[w]hile . . . it may be true that serious candidates traditionally attract money for their candidacy, we cannot say as a matter of law that one's candidacy is not serious or that he does not have the right to run merely because he does not have or has thus far failed to attract a certain amount of money."

[24] The ABA Special Committee on Election Reform states that ". . . any system of eligibility and distribution should attempt to minimize the importance of private contributions in attracting public funds." ABA Report at 6. Chapter 96 does precisely the opposite. One contributor of $250 in effect commands matching funds "checked off" by up to 250 other citizens. The contributor's voice is thus magnified, while the taxpayers are rendered mute by I.R.C. § 6096.

income on a joint return because of tax credit provisions, I.R.C. § 218. If they are in the 70 percent bracket, their income-tax liability would be reduced by $140. The government then adds $500, so the effect is a contribution of $1,000 at a cost of only $360. Chapter 96 thus permits the wealthy and the "special interests" to continue to give substantial amounts but at a lower cost to them than under the present system of private financing. See Note, Developments, *supra*, at 1269-70. No amount of drumbeating about eliminating corruption can constitutionally justify this kind of provision.

Although one reason for sustaining federal subsidies was said to be the need to save candidates' time and energy by reducing the need to raise funds (op. at 1513), the complex requirements of Chapter 96 create exactly the opposite result. Because contributions needed to qualify for federal matching-grants are small (under $250), it is difficult if not impossible for a "late" entrant to accumulate a sufficient amount of such contributions in a short period of time. Particularly since contributions are often difficult to raise without an announced and active candidate, would-be presidential nominees have entered the race and begun active electioneering and fund raising well before the traditional starting dates. Otherwise, their direct-mail fund-raising efforts (which involve a long and costly process before finally resulting in a "profit") would have almost no chance of success.

Chapter 96 deprives voters of rights as well as candidates. To the extent that a candidate's message is muted because of the discriminatory allocation of public funding, that necessarily deprives voters of information they might otherwise receive in a free market place of political ideas. *Lubin* v. *Panish*, *supra*, at 716. Fleishman, "The 1974 FECA Amendments," *supra*, at 889. Particularly when such alternatives as the voucher system are available as less intrusive means, there is no reason to resort to the crazy-quilt structure of Chapter 96.

D. *The Formula for Federal Funding of Conventions Violates the First and Fifth Amendments.*

Section 9008, I.R.C., providing for funding of nominating conventions, is unconstitutional for the same reasons that the prior-vote criterion for the funding of general-election presidential candidates is unconstitutional, see *supra*, pp. 152-54. Major parties receive equal amounts; minor parties lesser proportional amounts. New parties such as appellant Libertarian Party and independents such as appellant McCarthy receive no federal funds at all, not even a post-election subsidy based on performance.

The courts below were barely concerned with this discrimination (op. at 1565). Moreover, political conventions have considerable responsibilities quite apart from nominating a presidential ticket. As party governing bodies, they resolve philosophical disputes and chart the party's future course by writing party platforms and dealing with credentials disputes. All of these are legitimate and crucially important functions, *cf. Cousins* v. *Wigoda*, *supra*. Yet new parties and older third parties receiving less than 5 percent of the popular vote receive nothing to help defray their expenses.

How a court that can complain about "quadrennial Romanesque political extravagances" can then uphold blatantly discriminatory federal financing of major party conventions (which are often mainly exercises in political publicity, particularly when the renomination of an incumbent President is involved) is unclear. What is clear is that federal subsidies will help widen the gap between major parties and all other political groups. *American Party of Texas* v. *White*, *supra*, invoked by the court below (op. at 1565), can in no way support such an infringement of First Amendment rights.

VII.

The FECA Disclosure Requirements for Contributions to Candidates for Federal Office Are Unconstitutionally Overbroad.

Political committees, as defined by the FECA, must keep detailed records (subject to audit by the FEC) of all individuals contributing more than $10 to those committees. 2 U.S.C. §§ 432(b)-(d) and 438(a)-(d). Political committees and candidates are further required to file periodic reports disclosing the name, occupation, and principal place of business of all those contributing in excess of $100. *Id.*, § 434(b) (1)-(8). Every person who contributes or expends more than $100 other than by contribution to a political committee or candidate (including volunteers with incidental expenses exceeding $600) must also disclose his contributions to the FEC. *Id.*, § 434(e). Certain resources available to incumbent office holders, enumerated in *id.*, § 434(d), need not, however, be disclosed. Criminal penalties are provided for violations of the foregoing. *Id.*, § 441.

These disclosure requirements are unconstitutional not because any such requirements would be *per se* unconstitutional, but rather because they indiscriminately intrude upon associational privacy interests in a manner that is not limited to securing only those governmental interests which are served by disclosure. More particularly, the statutes here are unconstitutional in the scope of their application to minor-party and independent candidates because in such situations the valid governmental purposes served by disclosure are attenuated while the harm to associational interests is severe. Similarly, they are overbroad because the threshold amounts of $10 and $100 that trigger the record-keeping and reporting requirements, respectively, are excessively low, reaching well beneath the

level at which the governmental interests outweigh the claims of associational privacy.

Appellants recognize that disclosure requirements differ in two respects from expenditure and contribution limitations. First, properly drawn disclosure requirements do not involve the same direct restrictions on political activity or speech. Second, disclosure of certain contributions and expenditures can advance other constitutional values by providing voters with information relevant to their choice of candidates. Indeed, appellants believe that narrowly drawn disclosure requirements are the proper solution to virtually all the evils Congress sought to remedy by passing the challenged statutes. However, this Court must determine whether the challenged statutes are the means least destructive of associational interests and precisely related to achieving governmental interests. *Aptheker* v. *Secretary of State, supra; New York Times* v. *Sullivan, supra; Sherbert* v. *Verner, supra.*

A. *The Act's Disclosure Requirements Intrude Upon First Amendment Rights of Associational Privacy.*

It is well settled that the constitutional protection of associational privacy is not limited to advocacy which takes the form of litigation or public education, *e.g.*, *NAACP* v. *Alabama, supra,* but fully protects those whose association is for the purpose of political and electoral activity and advocacy. *Kusper* v. *Pontikes,* 414 U.S. 51 (1973); *American Party of Texas* v. *White,* 415 U.S. 767 (1974). As the Court observed in *Kusper:*

> "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. . . . The right to associate with the political party of one's choice is an

> integral part of this basic constitutional freedom." 414 U.S. at 56-57 [citations omitted].

Moreover, those associational rights are afforded the same protection against indirect restraints as they are against direct and heavy-handed intrusions. *NAACP* v. *Alabama, supra,* 357 U.S. at 461; *Kusper* v. *Pontikes, supra.* Accordingly, statutes which inhibit, even indirectly, the right to associate for the advancement of political purposes can be justified only if designed to achieve compelling governmental interests that can be furthered in no less intrusive a manner. *Kusper* v. *Pontikes,* 414 U.S. at 56-60; *American Party of Texas* v. *White,* 415 U.S. at 780-81.

That the disclosure of political affiliations which are manifested through political contributions can have a deep and intrusive inhibiting effect on such association is not only manifested by the record, but made plain by common experience.

While disclosure requirements may serve to buffer the dangers of corruption of governmental officials, they can also have a significant negative effect on contributions to political candidates, parties, and committees. This occurs because some potential contributors do not want their names disclosed, any more than most individuals would want their election-day ballot choices disclosed.

Substantial reasons exist to justify such fears. The celebrated "enemies list" was compiled in part from lists of contributors to Democratic presidential contenders. *Hearings on Watergate and Related Activities Before the Select Committee on Presidential Campaign Activities,* U.S. Senate, 93rd Cong., 1st Sess., Book 4, 1732-35 (1973). Other disclosure requirements have typically been directed at the members of unpopular groups or the adherents of unpopular causes: suspected Communists in the 1950's, proponents of integration in the 1960's, and members of

the anti-Vietnam-war movement in the late 1960's and early 1970's.[1]

There are considerable fears of private retribution as well. Disclosure of contributions could damage employment and business relationships. A public-school teacher in Alabama may oppose George Wallace but fear to support his opponent because school board members committed to Wallace will find out. A teacher in New York may support Wallace and fear to contribute to his campaign because the parents of his students may call him a bigot.

To be sure, the record here does not reflect the kind of focused and insistent harassment of contributors and members that existed in the *NAACP* cases.[2] But the record does show the clearly articulated fears of individuals, well experienced in the political process, who have stated that the systematic disclosure of political contributions required by the statute would lessen the amounts of contributions received by their political organizations. See, *e.g.*, Reed dep. tr. 50, 66-69; Reed aff. ¶¶ 29-32; McCarthy dep. tr. 17-18, 67-70, 106-07; Weil dep. tr. 27-28; Crane aff. ¶ 11G; Crane dep. tr. 38.

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[1] Recent revelations indicate that the Internal Revenue Service, under both Democratic and Republican administrations, gave special attention to the tax returns and contributors to tax-exempt groups on the right and on the left. And it has also been recently disclosed that agencies of the government maintain a computer network, with the disarming acronym "IMP," with information on the political activities millions of Americans, much of it gathered from lists of campaign contributions. In light of these practices, a potential contributor to a dissident political party will surely get the message from the flyer which rehearses the statutory legend: "A copy of our report is filed with the Federal Election Commission . . . ." 2 U.S.C. § 435.

[2] NAACP v. Alabama, 357 U.S. 449 (1958); Bates v. Little Rock, 361 U.S. 516 (1960); Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963).

The Mississippi Republican Party, for instance, is fearful of disclosure because of those party members who do not want their political contributions publicly known. Findings III, Reed 8, p. 49; App. II-740. The Party relies heavily on contributions in excess of $100 to finance its operations. Approximately two-thirds of the funds used to finance such operations come from contributors of $10 per month, made on a bank-draft system, *id.*, Reed 7, p. 49; App. II-740. The long-time dominance of the Democratic Party in that state made it hazardous for individuals to be publicly known as supporters of the Republican Party. These $120-per-year contributors and many others could remain anonymous under the Mississippi disclosure statute, which requires reporting only of contributions in excess of $500, Miss. Code Ann. § 23-3-41 (1972), and avoid possible harassment based on their association. Under the FECA, these contributors are not longer protected.

There is uncontradicted testimony by Sen. Buckley's 1970 Finance Chairman that contributions to that campaign were a very sensitive matter to many individuals in New York, Weil dep. tr. 28, when the candidate was the nominee of only the Conservative Party.

There is further uncontradicted testimony from Mr. Weil that many persons with Republican affiliations were reluctant to contribute to a third-party candidacy if that fact would be publicly known. At that time the option was open to such individuals to contribute through " Washington committees." Those committees were not subject to the federal or New York reporting and disclosure requirements, *id.* Under the FECA, that option is no longer open to them, and Conservative Party candidates will not be able to receive contributions without disclosing the donors' names. Sen. Long, a supporter of the challenged legislation, explicitly stated that "[t]he disclosure provisions really have in fact made it difficult for challengers to challenge incumbents." 120 *Cong. Rec.* S 18544 (daily ed. October 8, 1974).

And thus, as Sen. Long implied, contributions which otherwise would have been made are simply not made. It would be the rare contributor indeed who informed a party official that he did not intend to contribute because of fear of disclosure. Instead, the would-be contributor simply would remain silent, neither contributing nor explaining why he did not intend to do so, but seeking to avoid potential harassment. The fact, therefore, that there is little evidence of harassment or reprisals should not be surprising. Rosenthal, "Campaign Financing," *supra*, at 406-07. The chilling of political activity, though not easily measurable, is nonetheless real. Nothing else explains the large number of $99 contributions received by the Mississippi Republican Party. Reed aff. ¶ 11; Reed dep. tr. 31-32. See 120 *Cong. Rec.* S 4570 (daily ed. March 27, 1974). It would be ironic if one result of campaign reform were to discourage citizen involvement in politics.[3] See H. Rep. No. 93-1239, *supra*, at 120.

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[3] The result in Pichler v. Jennings, 347 F. Supp. 1061 (S.D.N.Y. 1972), has been strongly criticized precisely because the court there "sought to avoid the conceptual problem of defining minor party status by converting the issue into a question of fact: could the plaintiffs show that participants in, or contributors to the Conservative Party had been subject to 'reprisals' in the past?" Note, Developments in the Law—Elections, *supra*, at 1248. The authors continue:

> "That approach is tenuous. First, proof of reprisal is a difficult matter, as the sanctions are often subtle. Second, if disclosure truly deters, contributors fearful of reprisal will not place themselves in a position to suffer. Last, even if deterrence is not complete, there may be great injury to the organization before the *[Pichler]* test can be met." *Id.* at 1248-49.

The same Note also criticized the decision in Stoner v. Fortson, 379 F. Supp. 704 (N.D. Ga. 1974), for its insensitivity to the "especially severe burdens imposed, and the diminished importance of state interests, when disclosure is required of unpopular candidates and parties," *id.* at 1250. Indeed, the major effect on a new party might be a failure to grow, an effect impossible to prove yet very real.

The court in *Pollard* v. *Roberts*, 283 F. Supp. 248 (E.D. Ark. 1968), *aff'd per curiam*, 393 U.S. 14 (1968), clearly understood this phenomenon. There a local prosecutor investigating alleged election-law violations sought access to the Arkansas Republican Party's bank account, the effect of which would be to reveal individual contributors to the Party. Enforcement of a subpoena was enjoined as a violation of associational privacy:

> "While there is no evidence of record in this case that any individuals have as yet been subjected to reprisals on account of the contributions in question, *it would be naive not to recognize that the disclosure of the identities of contributors to campaign funds would subject at least some of them to potential economic or political reprisals of greater or lesser severity.*
>
> "Apart from fear of actual reprisal, many people doubtless would prefer not to have their political party affiliations and their campaign contributions disclosed publicly or subjected to the possibility of disclosure merely because an officer or agency clothed with investigatory powers may suspect that some members of their party may have violated the law. Disclosure or threat of disclosure well may tend to discourage both membership and contributions thus producing financial and political injury to the party affected." 283 F. Supp. at 258 (emphasis added).[4]

Recognizing these phenomena, this Court has not required the right of associational privacy to turn solely upon a detailed showing that a certain minimum number of

[4] Although the court in *Pollard* acknowledged the merit of general political-committee disclosure requirements, its holding was premised upon a recognition that a particular application of disclosure may so intrude on associational interests as to be unconstitutional.

people are harassed, lose their jobs, receive threats or suffer acts of violence. Its protection arises instead from the judicial recognition that the prospect of public identification with groups engaged in advocacy will deter individuals from such association. That is why this Court has characterized it as "hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy" may constitute an effective restraint on freedom of association and has "recognized the vital relationship between freedom to associate and privacy in one's associations . . . ." *NAACP* v. *Alabama*, 357 U.S. 449, 462 (1958). Indeed, in numerous cases, that right has been protected on the basis of that assumption alone and in the absence of a detailed showing of harassment. *United States* v. *Rumely*, 345 U.S. 41 (1953); *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965); *Pollard* v. *Roberts*, *supra*; see also *ACLU* v. *Jennings*, 366 F. Supp. 1041 (D.D.C. 1973), *vacated as moot sub nom. Staats* v. *ACLU*, 43 U.S.L.W. 5043 (1975). The proper rule was stated by Chief Judge Bazelon, dissenting below: "The Court has never varied the rigor of its scrutiny depending on the presence or absence of a record of harassment and chill. Rather, whenever a disclosure requirement—or any other law—has posed a reasonable danger of chilling the exercise of First Amendment rights, the Court has applied its most exacting review" (op. at 1596) (footnotes omitted). As we will now show, the majority below failed to apply such scrutiny.

B. *Application of The Act's General Disclosure Requirements to Minor-Party and Independent Candidates Serves No Compelling Governmental Interest Sufficient To Override the Associational Rights at Stake.*

The disclosure requirements cause particular difficulty to new and minor parties and independent candidates.[5] Organizations such as the Libertarian Party and the Committee for a Constitutional Presidency—McCarthy '76 are often viewed as "fringe" groups. Individuals who share their views might wish to contribute to them, but would be reluctant to do so if their contributions were made public. Contributing to a new party or an independent candidate is considerably different from contributing to an established party in most instances. See, *e.g.*, Crane aff. §§ 11E, 11G; Wertheimer aff. §22. Minor parties tend to take more well-defined positions and to adhere to them more strongly than do major parties. Sorauf, *Political Parties in the American System* 33-34 (1964). Indeed, a recognized function of minor parties is to create a climate of opinion in which major parties will adopt their stands on issues, not necessarily to elect their candidates to office, *Sweezy* v. *New Hampshire*, *supra*, at 251.

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[5] One law-review comment has observed:

> "Yet, because minor parties often advance unpopular political positions, and because their candidates usually have no expectations of victory, their contributors may feel more endangered by disclosure requirements than would supporters of the major parties. To the extent that effective advocacy of a political position in contemporary public life requires organizing a political group and collecting large amounts of money, this burden may stifle an unpopular point of view permanently. While the primary impact of disclosure statutes on the major parties may be to reduce the volume of their speech, the impact on minor parties could be to eliminate them entirely." Note, Developments in the Law—Elections, *supra*, at 1247.

In the often-quoted words of Chief Justice Warren: "History has amply proved the virtue of political activity by minority, dissident groups who innumerable times have been in the vanguard of democratic thought and whose programs were ultimately accepted." *Id.* at 251.

The majority below recognized that disclosure might work some harm on unpopular minor parties, and "does indeed infringe their First Amendment freedom to associate to advocate unorthodoxy," but concluded on balance that such rights were subject to "reasonable restrictions for reasons of compelling state interest . . . " (op. at 1548). That conclusion cannot be sustained.

Although this Court has not addressed or analyzed associational-privacy claims in the context of campaign-finance disclosure laws, it has recognized such claims in a variety of other situations.[6] This Court has also made it clear that the constitutional guarantee of associational privacy fully protects those whose association is for the purpose of electoral activity, *Kusper* v. *Pontikes*, 414 U.S. 51 (1973); *American Party of Texas* v. *White*, 415 U.S. 767

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[6] The right of associational privacy has been upheld as overriding claimed governmental interests in probing subversive activities within a state, Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) (concurring opinion); in regulating corporations doing business in the state, *e.g.*, NAACP v. Alabama, 357 U.S. 449 (1958); in preventing false or fraudulent political or other advertising by requiring that handbills identify their individual sponsors, Talley v. California, 362 U.S. 60 (1960); in scrutinizing the fitness of teachers, Shelton v. Tucker, 364 U.S. 479 (1960); in probing possible subversive influence in race relations, Gibson v. Florida Legislative Investigation Committee, 372 U.S. 539 (1963); in regulating foreign travel for espionage purposes, Aptheker v. Secretary of State, *supra;* in screening Communist political propaganda from abroad, Lamont v. Postmaster General, 381 U.S. 301 (1965); in protecting defense industries, United States v. Robel, 389 U.S. 258 (1967); and in assessing the character and fitness of applicants for admission to the bar, *e.g.*, Baird v. Arizona, 401 U.S. 1 (1971); In re Stolar, 401 U.S. 23 (1971).

(1974); *accord, Pollard* v. *Roberts, supra.* Accordingly, any inhibition of such association can be justified only by reference to the compelling-interest analysis identified in the associational-privacy cases.

That is why the two decisions of this Court relied on by the court below do not support the constitutionality of the FECA disclosure provisions. Although the decision in *Burroughs* v. *United States,* 290 U.S. 534 (1934), upheld the disclosure provisions of the Federal Corrupt Practices Act of 1925, that decision only established that Congress has authority under Article I of the Constitution to enact such legislation. No First Amendment issues were raised or decided in that case. Moreover, the deference concerning means to achieve goals accorded to legislative choices in that case, *id.*, at 547-48, is no longer the law when First Amendment rights are at stake, *Shelton* v. *Tucker, supra; Aptheker* v. *Secretary of State, supra; United States* v. *Robel,* 389 U.S. at 258 (1967).

Similarly, although *United States* v. *Harriss,* 347 U.S. 612 (1954), involved no direct associational-privacy claims, the Court nevertheless gave an extremely narrow reading to the federal lobbying statute, confining its reach to those persons or contributions the main purpose of which was to engage in core lobbying efforts through direct representations to members of Congress. *Harriss* and its approving citation of *Burroughs* do not sustain the sweep of the disclosure provisions here. And the holding of *Harriss* must be read together with *United States* v. *Rumely, supra,* where the Court rejected a congressional attempt "to inquire into all efforts of private individuals to influence public opinion through books and periodicals, however remote the radiations of influence which they may exert upon the ultimate legislative process . . . ." 345 U.S. at 46. The distinction between *Harriss'* recognition of power to regulate through disclosure those who bring direct pressures to bear at the core of the legislative process and *Rumely's* denial of power

to regulate those remote radiations of influence is highly relevant, for it suggests the distinction between disclosure of the funding of those major-party candidates with present access to governmental power and disclosure in the context of new, unorthodox, minor-party or independent candidacies whose present access to governmental power is normally remote.[7]

The court below saw three interests served by sweeping independent and minor-party candidates within the FECA's general disclosure requirements.

First, the Court thought that disclosure of the identity of those "angels" who occasionally support minor-party candidates would help ensure enforcement of the contribution limitations and other prohibitions in the FECA. However, there is virtually no showing in the record of such

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[7] The decision in United States v. Finance Committee to Re-Elect the President, 507 F.2d 1194 (D.C. Cir. 1974), relied on below, does not preclude this Court's consideration of the over-breadth challenge here. There, the conviction of the Committee for failing to report the $200,000 cash contribution from Robert Vesco was upheld against a claim that the 1971 Act's disclosure requirements infringed First Amendment freedoms. Since the conduct involved there—a $200,000 cash contribution to an incumbent President's re-election campaign—is the paradigm case for disclosure, it was hardly an appropriate occasion to employ the overbreadth doctrine to overturn the conviction on the basis of the Act's improper reach. See, *e.g.*, Broadrick v. Oklahoma, 413 U.S. 601 (1973). Second, there was no attempt to make a factual showing of harm, because the issue was not even raised in the District Court, rendering "the barren record . . . not an appropriate medium" for a challenge to a statute whose general validity had been upheld forty years earlier in *Burroughs.* In this case, however, in a factual context and involving parties far from the core of any valid legislative purpose requiring disclosure, careful scrutiny of the reach and imprecision of the disclosure provisions is most appropriate.

Similarly inapposite is Stoner v. Fortson, 379 F. Supp. 704 (N.D. Ga. 1974) (three-judge court), where the challenge to a similar state disclosure statute was made by a candidate in a major-party primary.

violations sufficient to warrant inclusion of all minor-party and independent candidates within the FECA's sweep. Conversely, the record does show, as the dissent noted, that minor parties generally receive little money and have few large contributors.[8]

Second, the Court found persuasive the public's interest in knowing "the composition of the angel's wings and what makes them fly," so that "voters are not required to vote blind" (op. at 1545). However, there is no indication in the record that members of the public or of the news media are significantly interested in contribution information about minor-party candidates. In addition, since the views and programs of minor parties tend to be well established and well known, there is a diminished public need to know the identity of the supporters of such a party for purposes of evaluating their programs, platforms, or candidates. But most importantly, since the "radiations of influence" which minor parties generally exert upon the electoral process are "remote," *cf. United States* v. *Rumely, supra,* 345 U.S. at 146, the compelling interest in identifying the sponsors of such activity is remote as well. Indeed, the electoral activities of minor-party and independent candidates are much more directed at influencing public opinion than at achieving electoral power. To that extent, those activities are much more similar to the functions of independent "issue"

[8] Only 6 percent of the contributions to minor parties are in amounts over $1,000. Findings II, A 56, 73, pp. 103, 110-11; App. II-453,457. Spending by minor-party and independent candidates for federal office normally constitutes approximately 2 percent of all federal political spending. See, *e.g.*, Findings II, A 13, p. 89; App. II-441. To be sure, minor-party and independent candidates sometimes are successful, and may be so in the future if the blatant discriminations against them in many sections of the challenged statutes are held unconstitutional. That possibility could easily be handled by requiring post-election disclosure by any minor-party or independent candidate who managed to win office; that would be sufficient to prevent undue influence by large contributors on elected officials.

organizations which the court below afforded constitutional protection by invalidating Section 437a. If the public interest in learning the identity of contributors to issue organizations, in order better to evaluate their positions, is insufficient to overcome the First Amendment rights of such organizations and their contributors, then the same should be true of minor-party and independent candidates as well.

Third, though recognizing that any connection between preventing official corruption and disclosure of minor-party contributions was less substantial, the court below thought that since it was not impossible that such candidates might win office, the rationale had some force. But, obviously, any potential for corruption exists only where those who hold governmental power can exercise favoritism. Libertarian Party candidates have never been in a position to raise milk price supports to advantage special-interest contributors. The Conservative Party of New York has never nominated an ambassador to reward a large contributor. The Committee for a Constitutional Presidency—McCarthy '76 has never controlled the awarding of governmental contracts. The corruption-prevention rationale is totally irrelevant to minor parties and their candidates, committees and supporters.

Finally, common to all three interests was the Court of Appeals' concern that disclosure of contributors to minor parties was necessary to prevent the "stalking horse" role, whereby a minor party is created or funded by one of the two major parties. But there is not a bit of evidence in the record to show that the stalking-horse problem is real or substantial, or that the conspiracy required to effectuate such a strategy could easily form, or that the Congress was even concerned with such a problem. In any event, disclosure of the expenditures of major-party candidates or committees is an effective deterrent. The extremely remote possibility of this problem is a grossly inadequate basis to

justify the very real harm that wholesale disclosure may impose on minor-party or independent candidates.

These various interests cannot sustain the indiscriminate sweep of the FECA's disclosure provisions. "Sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike." *Jenness* v. *Fortson*, 403 U.S. 431, 441-42 (1971). The same statute which treats candidates and parties with sharp and unconstitutional distinctions when it comes to disbursing benefits in the form of public financing makes no such distinctions in imposing the burdens on associational rights of reporting and disclosure requirements. Nor, similarly, can it be contended that securing the general interests in disclosure cannot be achieved by less drastic means. In addition to the distinctions employed in the public financing provisions, Congress could have defined as minor parties, and spared from disclosure, those not qualifying for automatic ballot access under state law, thus incorporating the lower thresholds employed by the states. See Note, Developments in the Law—Elections, 88 Harv. L. Rev. 1111, 1124 n.11 (1975). Instead, as with the Communist Party membership cases, Congress indiscriminately cast the net of disclosure "across a broad range of associational activities," *United States* v. *Robel, supra*, 389 U.S. at 265-66, without regard to the widely varying interests at stake. See also *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964). As in those cases, the disclosure provisions here are defectively overbroad and improperly applied to the appellants.

C. *The Disclosure Thresholds Lack a Substantial Nexus with the Claimed Governmental Interests Advanced.*

The first major federal legislation requiring disclosure of contributions to political candidates or committees, passed in 1910, 36 Stat. 822, required disclosure of certain contributions to candidates of $100 or more. Under the FECA, contributions in excess of $100 are required to be

reported. The triggering threshold for automatic reporting of contributors is only one penny higher than that first enacted in 1910.

Neither the 1910 legislation, nor the Federal Corrupt Practices Act of 1925, nor the FECA of 1971 has any legislative history revealing the rationale for the $100 triggering threshold. The Consumer Price Index rose 397 percent between 1913 (the first year in which statistics are available) and 1974.[9] Even without considering the increase in the cost of political campaigns since 1910, a present figure comparable to the 1910 threshold would have to be at least $397. The $100 figure has no greater rationality than that it is a round number. Requiring detailed record-keeping of all contributions in excess of $10, subject to government inspection, is even more difficult to justify.[10] It constitutes a monitoring of virtually all political contributions to federal candidates. To suggest that such record-keeping advances any countervailing interest in preventing corruption is ludicrous.[11]

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[9] Calculated from the Consumer Price Index (U.S. City Average, All Items, Series A) prepared by the Department of Labor, Bureau of Labor Statistics.

[10] The ACLU has noted this difficulty and stated that "[s]mall contributions which cannot purchase corruption should not be disclosed . . . . It is ridiculous to suggest that contributions of this [$10 and $100] size have a corrupting influence on presidential campaigns or even on congressional campaigns. But while the disclosure of such contributions is irrelevant to corruption it seriously intrudes on privacy since it provides a ready-made list for employers to check on the political activities of their employees." ACLU Report at 14.

[11] One of the supervisory officers charged with enforcing the 1971 Act, the Secretary of the Senate, suggested that eliminating record-keeping of all transactions of less than $100 would be a sensible change endangering no valid governmental interests. Hearings Before the Sub-Committee on Privileges and Elections and the Senate Committee on Rules and Administration, S. 23, *et al.*, 93d Cong., 1st Sess. 63-64.

(continued)

The FECA Amendments were enacted, moreover, before one full election cycle had taken place after the effective date (April 7, 1972) of the 1971 FECA. The 1974 Act made only minor changes in the 1971 Act's provisions relating to disclosure (*e.g.*, the disclosure threshold was raised from $100 to $100.01, 2 U.S.C. § 434(b)). There was thus no opportunity to evaluate the full impact of the existing disclosure requirements, with regard to modifying them or with regard to any need for more drastic legislation.

Although *Burroughs* v. *United States* upheld the predecessor disclosure statute and was cited with approval in *United States* v. *Harriss*, the associational-privacy cases decided since then require much closer scrutiny of whether the present disclosure requirements directly and precisely serve the interests claimed for them than was afforded below.[12]

The court below, relying on the perceived absence of a showing of harm from disclosure in the record, felt that there was no need to re-examine *Burroughs* and *Harriss* in that fashion and that the interests served by disclosure were generally compelling.

It is conceded that there are a variety of circumstances where disclosure of the identity of contributors serves com-

[11] (continued)

The court below ruled that the challenge to the $10 record-keeping requirements and the audit provision was "unripe" since there was no indication that the FEC would automatically disclose the identity of any such small contributors learned during an audit. Based on the lack of a provision authorizing public disclosure of such records by the FEC, the court simply assumed they had a confidential status.

[12] The lobbying statute in *Harriss* required disclosure only of those contributors of more than $500 per year, a threshold significantly higher than the threshold here. In 1954, $500 could be far more "influential" than $101 (or $500) could ever hope to be today.

pelling governmental interests. But even when the governmental interest is deemed compelling, the nexus between disclosure and the governmental interest advanced, and the precision with which the particular disclosure requirements promote these interests, are as important as the degree of harm which would result from disclosure.[13] Absolutely no such connection appears anywhere in the legislative history, or in any of the evidence in this case. There is no evidence that any federal officials or candidates for federal office have been corrupted by amounts in the range of $100.[14] Nor can there be; common sense dictates that even the most

[13] See, *e.g.*, Gibson v. Florida Legislative Investigations Comm'n, 372 U.S. 539 (1963); Shelton v. Tucker, 364 U.S. 479 (1960); Bates v. Little Rock, 361 U.S. 516 (1960).

Surely, for example, invalidating a statute requiring disclosure of organizational affiliations by each person writing a partisan letter to the editor or a guest editorial, or a statute requiring voters to disclose how he or she voted, would not turn on a showing that such disclosure would cause a given number of people to lose their jobs. Such statutes would be infirm, among other reasons, because of the lack of any connection between a governmental interest and such disclosure sufficient to warrant burdening such fundamental First Amendment activities. They would also be invalid because such information is presumed to be none of the government's business.

So too for the right to associate with, contribute to and support political causes and candidates whose views one shares, unless the required disclosure is precisely tailored to those circumstances and amounts involving the possibility of corruption. Writing a check to a candidate is a very fundamental political act. One-third of those surveyed in an opinion poll had contributed financially to a political campaign. Other studies show that, next to actually voting, making a political contribution ranks with wearing a political button or displaying a political sticker as a common form of political activity. Findings I, 107, p.97; App. II-147.

[14] Indeed, the Common Cause information on contributors to the Finance Committee to Re-Elect the President does not even contain a category for contributors of less than $5,000. Findings II, A 119, pp. 157-81; App. II 508-64.

corrupt Members of Congress will not be "bought" for so small an amount.[15] Sen. Humphrey, a supporter of the challenged legislation, made precisely that point, 120 *Cong. Rec.*, S 5540 (daily ed. April 9, 1974).

The *NAACP* cases show that the substantial-connection element requires not merely a general connection between the governmental interest (preventing corruption) and the means employed to achieve that interest (disclosure of contributions), but rather a specific relationship between the achievement of the general interest and the particular disclosure requirement. See, *e.g.*, *Bates* v. *Little Rock*, *supra*, at 524-25. Thus, the substantial-nexus test is not whether disclosure is generally valid, but whether it is specifically necessary. Here, for the reasons set forth above, application of the requirements to many of these appellants and other minor parties like them does not meet the substantial-connection test.

The court below found disclosure necessary to prevent the secrecy "so essential to the appearance and reality of influence dealing" (op. at 1547). Disclosure of some contributions will have these salutary effects, but the challenged statutes reach well beyond that.

The $10 and $100 thresholds apply to all elections for federal office. In a clear example of legislative failure to evaluate with precision the means necessary to attain the goal of removing corruption from the electoral process, Congress made no effort to calibrate the disclosure threshold requirements with respect to different federal offices,

[15] The ABA Special Committee on Election Reform endorsed disclosure, but it did *not* endorse the FECA's triggering thresholds. Indeed, its Report explicitly stated that ". . . disclosure should be required of those amounts which could tend to improperly influence office holders and policy." ABA Report at 5. As the text indicates, no one could argue that $10 or $100 are amounts that could tend to influence improperly candidates for federal office.

as it did with expenditure limits, see 18 U.S.C. § 608. That there was no similar effort to arrive at different disclosure thresholds indicates that Congress did not seriously consider either the impact or the intent of the $100 threshold and clearly did not employ the least drastic means to attain its goals. In *Shelton* v. *Tucker*, *supra*, this Court held:

> ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." 364 U.S. at 488.

See also *Kusper* v. *Pontikes*, *supra*, at 56-60; *American Party of Texas* v. *White*, *supra*, at 780-81. These standards require closer scrutiny than the "reasonable latitude as to where to draw the line" which the court below afforded to Congress.

A more carefully drafted system of disclosure, fixing the disclosure thresholds at levels which truly protect the integrity of the electoral process, would be constitutionally permissible. The FECA, however, has not attempted to draw such lines with precision.

D. *Requiring Disclosure by Individuals Who Make Independent Expenditures Unconstitutionally Chills Freedom of Speech.*

Every person (other than a political committee or candidate) who makes contributions or expenditures other than by contribution to a political committee or candidate in excess of $100 per calendar year must file with the FEC a statement giving his full name, address, occupation and principal place of business, and periodic reports giving the same information required in reports by political com-

mittees. That includes identifying each person to whom an expenditure is made, the amount, date and purpose of each such expenditure, and an allocation of expenditures among candidates if more than one was involved. 2 U.S.C. §§ 434(b)(9), 434(e).

The requirement is the same as that imposed on political committees, but with one vital difference. Section 434(e) requires individual citizens to report political activity costing more than $100 directly to the FEC, upon pain of criminal penalties if they fail to do so. *Id.*, § 441.[16]

In a one-paragraph discussion of this section, the Court of Appeals said only that, if the limit on independent expenditures is constitutional, so too is a requirement that such expenditures be disclosed (op. at 1549). The court below did not even mention, let alone distinguish, the one case that is squarely on point, and squarely contradictory to Section 434(e)—*Talley* v. *California*, 362 U.S. 60 (1960).

Here, as in *Talley*, the challenged statute clearly encompasses the distribution of handbills and leaflets dealing with political subjects. Here, as in *Talley*, the statute is not limited to "... providing a way to identify those responsible for fraud, false advertising and libel." 362 U.S. at 64. Here, as in *Talley*, "[t]here can be no doubt that such an identification requirement would tend to restrict freedom to distribute information and thereby freedom of expression," *id.*

In several respects, Section 434(e) is actually more burdensome and chilling than the municipal ordinance stricken down in *Talley*. There, the only requirement was that handbills and leaflets had to contain on their face cer-

[16] It appears from the statute and the FEC's forms that, once the reporting requirement has been triggered by the making of one expenditure in excess of $100, *all* expenditures by that individual must be reported whether in excess of $100 or not.

tain information, 362 U.S. at 60-61. Section 434(e), however, affirmatively requires individual citizens to report their expenditures directly to a governmental agency. Immense chilling effects are created by requiring persons to write to the FEC and inform it of their political activities.

The *Talley* decision did not require proof of harassment or reprisals. Rather, it declared the Los Angeles ordinance void on its face, 362 U.S. at 65, because as Mr. Justice Harlan said, ". . . it will not do for the State simply to say that the circulation of all anonymous handbills must be suppressed in order to identify the distributors of those that may be of an obnoxious character." 362 U.S. at 66 (Harlan, J., concurring). *Accord, Zwickler* v. *Koota*, 290 F. Supp. 244 (E.D.N.Y. 1968), *rev'd on other grounds sub nom. Golden* v. *Zwickler*, 394 U.S. 1031 (1969).

If the important role played by handbills, leaflets, and brochures—all of which are forms of spontaneous political communication—is to be preserved, Section 434(e) must be declared unconstitutional. It is flatly inconsistent with *Talley* v. *California*, *supra*, and its effects will be even more serious than the other disclosure provisions challenged herein. If the "breathing space," *NAACP* v. *Button*, 371 U.S. 415, 433 (1963), necessary to protect the First Amendment is to be preserved, Section 434(e) must fall.

Finally, apart from the statute's direct conflict with the protection of political anonymity recognized in *Talley*, the very real, practical burdens of the reporting requirements themselves are certain to deter individuals from making expenditures for their independent political speech. Core First Amendment activities cannot be thus burdened. In *Thomas* v. *Collins*, 323 U.S. 516 (1945), a Texas statute required labor organizers simply to register with a local official in order to give a speech. This Court, though recognizing that such requirements might be justifiable where solicitations of funds or subscriptions were concerned, held to the contrary where speech alone was involved:

> "If one who solicits support for the cause of labor may be required to register as a condition to the exercise of his right to make a public speech, so may he who seeks to rally support for any social, business, religious or political cause. We think a requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment." 323 U.S. at 540.

If a simple registration requirement is "quite incompatible" with the First Amendment when imposed as the precondition of making a speech, then the far more detailed and burdensome reporting requirements of Section 434(e) can surely not be sustained solely on the ground that they will help enforcement of a provision which is itself thoroughly suspect.

VIII.

The Enforcement Provisions of the Challenged Legislation Violate the Constitution.

A. *The Method of Appointment of Members of the FEC Is Unconstitutional.*

Two members of the Federal Election Commission (FEC) are appointed by the President *pro tem* of the Senate upon the recommendation of the majority and minority leaders; two are appointed by the Speaker of the House upon the recommendation of the majority and minority leaders; and two are appointed by the President. All nominees must be confirmed by both Houses. 2 U.S.C. § 437c(a).[1]

The Constitution explicitly vests the appointment power in the President:

> "[The President] shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States, whose appointments are not herein otherwise provided for, and

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[1] Rep. Frenzel, one of the strongest supporters of the FEC, stated after the passage of the FECA Amendments that the FEC was "unique" among federal agencies because of its members' mode of appointment. 120 Cong. Rec. H 10908 (daily ed. November 20, 1974.)

Congress has, on many occasions, exercised the power of appointment. In no case, however, has it attempted to exercise this power with respect to a department, agency or board with the vast powers vested in the FEC. The Rock Creek Park Committee and the Committee to Celebrate 100 Years of Peace and Independence are of a wholly different dimension. And even these exercises of the appointment power have never been approved by judicial decision.

> which shall be established by law; but the Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the courts of law, or in the heads of departments." Article II, Section 2.

The six FEC members are "officers of the United States." They clearly have executive and judicial functions to perform. The FEC has the power to investigate violations of the FECA, to exercise primary jurisdiction over civil enforcement, to render advisory opinions, to prescribe rules and regulations implementing the Act, to determine eligibility for public financing, and to disqualify a person from running for federal office. 2 U.S.C. §§ 437d, 437f, 437g, and 456. This enormous executive and judicial power is magnified because the provisions of the FECA are so vague and delegate so much power to the FEC. The holding below that persons wielding such power are not "officers of the United States" most seriously distorts the separation of powers embodied in the Constitution.

(1) *The Appointments Clause Is an Important and Carefully Considered Part of the Constitutional Scheme.*

The history of the appointments clause demonstrates beyond doubt that the constitutional language was deliberately chosen. At the time of the Constitutional Convention, all state constitutions save that of New York vested the appointing power in the legislature. See *The Federalist*, No. 47, Cooke ed. 1961, p. 323; Thach, *The Creation of the Presidency, 1776-1789*, 33 *et seq.* (1969). The Framers were clearly aware of this fact, for the locus of the appointment power was a matter of heated debate in the states. In 1778, for example, a proposed Massachusetts constitution failed of ratification partly because of its weak executive. Many Massachusetts towns submitted written reasons for rejecting that constitution. Among these, the important "Essex Result" emphasized that the proposed Constitution

did not fix the appointment power in the executive branch. Thach, *supra*, at 47.

At the federal level, the vesting by the Articles of Confederation of the power of appointment in Congress was a major source of dissatisfaction. For instance, "factional differences kept important offices unfilled for long periods." Thach, *supra*, at 73; op. at 1572.

At the Constitutional Convention the appointment power was highly controversial: some wanted it to remain in the legislative branch while others desired to entrust it exclusively to the executive. The ultimate resolution, in language as carefully and deliberately drafted as any in the Constitution, was a compromise: the power of appointment would be lodged in the executive, but the Senate must give its advice and consent. 2 Farrand, *Records of the Federal Convention* 535-39 (1934 ed.); 3 *id*. at 99.

This compromise was intended to exclude the legislative branch from the power to nominate officers of the United States, as both the explicit consitutional language and the statements of the Framers make clear. Hamilton wrote,

> "It will be the office of the President to *nominate*, and, with the advice and consent of the Senate, to *appoint*. There will, of course, be no exertion of *choice* on the part of the Senate. They may defeat one choice of the executive and oblige him to make another but they cannot themselves *choose*. They can only ratify or reject the choice he may have made. They might entertain a preference to some other person at the very moment they were assenting to the one proposed, because there might be no positive ground of opposition to him; and they could not be sure, if they withheld their assent, that the subsequent nomination

would fall upon their own favorite, or upon any other person in their estimation more meritorious than the one rejected." *The Federalist*, No. 66, Cooke ed. 1961, p. 449 (emphasis in original).

In *The Federalist*, No. 47, Madison wrote:

> "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." Cooke ed. 1961, p. 324.

He recognized the particular pertinence of these principles to the appointment power:

> "each department should have a will of its own, and consequently should be so constituted that the members of each should have as little agency as possible in the appointment of the members of the others." *The Federalist*, No. 51, Cooke ed. 1961, p. 348.

During the first Congress Madison said, "I conceive that if any power whatsoever is in its nature executive, it is the power of appointing, overseeing and controlling those who execute the laws," 1 *Annals of Congress* 481 (1789), and that *"if the legislature determines the powers, the honors, and emoluments of an office we should be insecure if they were to designate the officer also," id.* at 581-82 (emphasis added).[2]

In *The Federalist*, No. 76, Hamilton made the point even clearer when he argued that the Senate's effective veto on appointments would be beneficial:

[2] See generally The Federalist, No. 51, Cooke ed. 1961, pp. 347-50; *id.*, No. 73, at 494-95.

> "... the necessity of their concurrence would have a powerful, though in general, a silent operation. It would be an excellent check upon a spirit of favoritism in the President, and would tend greatly to prevent the appointment of unfit characters from state prejudice, from family connection, from personal attachment, or from a view to popularity." Cooke ed. 1961, p. 513.

Finally, Jefferson stated in a letter:

> "Nomination to office is an executive function. To give it to the legislature as we do is a violation of the principle of separation of powers. It swerves members from correctness by temptation to contract for office for themselves and to corrupt barter for votes, and destroys responsibility by dividing it among a multitude. By leaving nomination in its proper place among executive functions the principle of the distribution of powers and responsibility weighs with its heaviest force upon a single head." Quoted in *Field* v. *People*, 3 Ill. 79, 141 (1839).[3]

What case law there is strongly supports these propositions. In *Springer* v. *Government of the Philippine Islands*, 277 U.S. 189 (1928), the Governor General of the Philippines challenged the validity of an act of the Philippines legislature creating the National Coal Company and the Philippine National Bank. That legislation provided that the Board of Control would be composed of the Govenor General, the President of the Philippines Senate, and the Speaker of the Philippines House. The President and Speaker were to elect the directors of the company. This

[3] See also Cutler and Johnson, "Regulation and the Political Process," 84 Yale L.J. 1395, 1411 (1975): "The President is the only nationally elected officer and thus, at least arguably, our most politically accountable official."

Court held that the organic act of the Philippines vested the Governor General with executive power, including the power to appoint governmental officials. The legislation was held invalid on the ground that the legislature could not confer an executive power on some other body or person.

In *United States* v. *Ferreira*, 54 U.S. 39 (1851), Chief Justice Taney, referring to commissioners empowered to decide claims arising under a treaty with Spain, wrote that:

> "... the power of appointment is in the President, by and with the advice and consent of the senate; and Congress could not by law, designate the persons to fill these offices." *Id.* at 50-51.

The limited nature of the Article II, § 2, cl. 2 grant of participation by the Congress in the appointment of executive officers was made plain in *Myers* v. *United States*, 272 U.S. 52, 164 (1926): "... the provisions of the second section of Article II, which blend action by the legislative branch, or by part of it, in the work of the executive, are limitations to be strictly construed and not to be extended by implication." See also *Humphrey's Executor* v. *United States*, 295 U.S. 602, 625-26 (1935), noting that the Federal Trade Commission is independent of the executive *"except in its selection"* (emphasis in original).[4]

Scholars have similarly concluded that "Congress has no authority to appoint persons to the Federal Government or to indicate the persons to be appointed by the Executive." 2 Antieau, *Modern Constitutional Law* § 13:14, at 514 (1969); see also Mechem, *Public Offices and Officers*, §§ 102-06, at 42-44 (1890). Two Attorneys General have

[4] See also Ponzi v. Fessenden, 258 U.S. 254, 262 (1922); J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928); O'Donoghue v. United States, 289 U.S. 516, 530 (1933).

concurred in this view. 37 Ops. Att'y Gen. 56, 58 (1933); 39 Ops. Att'y Gen. 61, 62 (1937). Presidents have vetoed legislation specifically on these grounds: Richardson, *Messages and Papers of the Presidents* (1896-99), VIII, 2211 (President Arthur); H. Doc. No. 529, 72nd Cong. 2d Sess., 76 *Cong. Rec.* 2445 (1933) (President Hoover); H. Doc. No. 252, 75th Cong., 1st Sess., 81 *Cong. Rec.* 4779 (1937) (President Roosevelt); Weekly Compilation of Presidential Documents VII, 1634-35 (1971) (President Nixon).

(2) *The FEC's Members Are Officers of the United States and Must Therefore Be Appointed by the President.*

The Court of Appeals stated that "Congress cannot constitutionally appoint the members of a commission or agency that performs primarily executive or judicial functions" (op. at 1575). That is an incorrect statement of the proper constitutional standard. *All* federal officials meeting certain tests of tenure, duration, emoluments, and duties are officers of the United States, and therefore must be appointed by the President, the courts or the head of a department pursuant to the Constitution. The only exception is that, when subordinate employees of the legislative and judicial branches perform solely functions which those branches could perform directly, it necessarily follows that they may be appointed by those branches. Thus the proper test is not how to characterize the "primary" functions of an agency—inevitably a difficult and subjective test—but whether the agency is charged with performing any substantial functions which under the constitutional scheme are to be performed by officers of the United States. Under that test, there can be no doubt of the outcome here.[5]

[5] See pp. 204-07, *infra*, for our alternative argument that even if the Court of Appeals' standard is correct, the FEC does perform "primarily executive or judicial functions," and accordingly, on the Court of Appeals' own reasoning, its members must be appointed by the President.

In *United States* v. *Hartwell*, 73 U.S. 385, 393 (1867), this Court said:

> "An office is a public station, or employment, conferred by the appointment of government. The term embraces the ideas of tenure, duration, emolument, and duties."

The Court held that a Treasury clerk was an officer, noting that his duties "were continuing and permanent, not occasional or temporary," *id.* The FEC members are clearly officers under the *Hartwell* test. Contrast *United States* v. *Germaine*, 99 U.S. 508, 512 (1878). In 18 Ops. Att'y Gen. 409 (1886), the Attorney General stated that the President must appoint the Chief of Examiners of the Civil Service Commission, saying:

> "The examiner is certainly, under this act, an officer, as distinguished from a mere agent, clerk, or employee. His station embraces the ideas of tenure, duration, emolument, and duties, and then becomes an office." See also 11 Ops. Att'y Gen. 209 (1865).

Finally, in *United States* v. *Maurice*, 26 Fed. Cas. 1211, 1214 (Cir. Ct. D. Va. 1823), Chief Justice Marshall stated a similar test for "officership," also met by the FEC members:

> "Although an office is 'an employment' it does not follow that every employment is an office. A man may certainly be employed under a contract, express or implied, to do an act, or perform a service, without becoming an officer. But if a duty be a continuing one, which is defined by rules prescribed by the government, and not by contract which an individual is appointed by government to perform, who enters on the duties appertaining to his station, without any contract defining them, if those duties continue, though the person be changed; it seems very difficult to distinguish such a charge or employment from an office, or the person who performs the duties from an office. If it may be converted into a contract, it must be a contract to perform the duties of the office of agent of fortifications, and such an office must exist with ascertained duties, or there is no standard by which the extent of the condition can be measured."

See also Mechem, *supra*, §§ 1-20, at 1-9.

The congressional attempt to appoint a majority of the members of the FEC is flatly at odds with the language, history and case law of the Constitution. See Watson, "Congress Steps Out; A Look at Congressional Control of the Executive," 63 Cal. L. Rev. 983, 1037-43 (1975). Were the Court to permit this usurpation of executive power, there would be no principled constitutional bar to congressional appointment of the members of the Securities and Exchange Commission or the National Labor Relations Board. *Cf. Gravel* v. *United States*, 408 U.S. 606, 624-25 (1972).[6]

The majority below apparently believed that appellants' arguments would preclude congressional appointment of its own inferior officers (op. at 1572). This is plainly incorrect, for such inferior officers are not "officers of the United States" subject to presidential appointment. The power of the legislative and judicial branches to select their own inferior officers to assist them in their day-to-day functioning (*e.g.*, the Secretary of the Senate or the Doorkeeper of the House) is wholly consistent with the separation of powers, and indeed necessarily follows from that very

[6] Indeed, Congress is now considering a proposal that would vest the appointment of several Governors of the Postal Service in Congress. H.R. 2445, 94th Cong., 1st Sess. (1975) § 8.

principle. Thus, such "officers of the court" as bailiffs are not "officers of the United States" and are appointed by judges of federal courts. *United States* v. *Swift*, 139 F. 225, 227 (1st Cir. 1905). The same principle applies to the Secretary of the Senate and similar positions. If it were otherwise, the executive would be able to encroach into the legislative and judicial spheres, just as in the FEC's mode of appointment Congress has encroached into the executive sphere.

Clearly, bailiffs (as agents of the courts) and the House Doorkeeper and others (as agents of the Congress) perform *only* judicial and legislative functions respectively. Everything they do could be done by a judge or justice or by the Congress. That is not the case with the FEC. Congress' function is to enact laws, not to render advisory opinions about the effects of statutes already passed, not to set general policy with respect to such statutes, and certainly not to enforce such statutes through civil actions.

Indeed, the Court of Appeals agrees that "the Commission has . . . been delegated various quasi-judicial and quasi-executive powers" (op. at 1575). Because it did not address these powers on grounds of lack of ripeness, it declined to "invalidate on its face a statutory provision that confers" such powers, *id.* at 1576. Judge MacKinnon's dissent provides the complete answer to this contention:

> "In light of the deep and pervasive involvement of the Commission in the present and anticipated political affairs of the plaintiffs . . . . [and because the] power to anticipate violations and seek injunctions against persons suspected of planning activity which may be unlawful certainly gives the enforcement role of the Commission a much more immediate impact on plaintiffs' affairs than does the normal statutory enforcement procedure which is brought into play only after a violation has occurred . . . . I would hold that [Questions 8(a) through (d)] are ripe for review" (op. at 1611-12).

Judge Tamm's dissent underlined the practical reasons for considering these issues ripe: "It is clear that all planning in this political season must be made with FECA and the Commission in mind" (op. at 1607). Finally, the FEC has now begun promulgating rules, including rules relating to Title 18,[7] see, *e.g.*, 40 *Fed. Reg.* 32951 (Aug. 5, 1975) (FEC Notice 1975-18). Political candidates, parties and committees must follow these rules in their daily activities, and their actions are inevitably affected thereby.

The court below also relied on the suggestion made by the FEC's Special Counsel during oral argument that the FEC "would not utilize in [sic] its civil enforcement power but would instead refer appropriate cases to the Department of Justice. . ." (op. at 1576). The court specifically stated that the civil-enforcement power raised "very serious constitutional questions," but believed that the issue posed by that power was not ripe for adjudication since no party had been joined in a civil-enforcement action initiated by the FEC, *id.*

Yet by letter of August 28, 1975, FEC Chairman Curtis abandoned the position taken by the FEC at oral argument and threatened appellant Committee for a Constitutional Presidency—McCarthy '76 with enforcement action, declaring that "[t]he Act also assigns civil jurisdiction to the Commission of all apparent violations of the Act and Sections 608, 610, 611, 613, 615, 616 and 617 of Title 18 of the United States Code." (See Appendix B to this brief for the

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[7] In its main brief below, the FEC disclaimed any rulemaking power with respect to Title 18. *On the same day that brief was filed*, the FEC issued a Notice of Proposed Rulemaking, 40 Fed Reg. 23833-34 (June 2, 1975), involving, *inter alia*, statutory sections of Title 18.

full text of the letter.) When the average citizen threatened with enforcement action reads such a statement he can reasonably assume that the FEC will use the power it so clearly asserts.

Moreover, since appellants make a facial attack on the mode of appointment of the FEC it is of no consequence whether or not the FEC may use or has used all its powers. The question is whether the statute as written—and which beyond question grants such powers—stands or falls as a violation of the separation of powers and due process doctrines. Even if the court below was correct that the constitutionality of as-yet-unexercised powers of the FEC is not yet ripe for review as distinct questions, a quite different issue is presented by appellants' attack on the method of appointment—an issue no one claims is unripe. In determining whether the Commissioners are officers of the United States, this Court should look not only to powers they have thus far exercised, but to all the powers Congress gave them, for the question is whether *the offices which Congress created and intended to be performed* are in their nature such that only the President can constitutionally make appointments to them.

The issue of the FEC's mode of appointment is ripe for review, and requires a decision that that mode of appointment is facially unconstitutional as an abridgement of the President's power to appoint "officers of the United States."

(3) *The FEC Performs Primarily Executive and Judicial Functions; Its Members Must Therefore Be Appointed by the President.*

The court below considered only one of the FEC's powers, the power to render advisory opinions; it declined to address the rest of the powers on the ground they were not ripe for review (op. at 1576). Even as to advisory opinions, however, the majority below did not address

Judge MacKinnon's dissenting view that the advisory-opinion power interferes with the judgments of federal prosecutors interpreting the criminal statutes (op. at 1579). The advisory-opinion power is in a sense judicial[8] and in a stronger sense executive; what is clear is that it is in no sense legislative. From every practical standpoint it is the most important of the FEC's powers. Thus an agency possessing that power, and exercising it on a massive scale, cannot possibly be held to be "primarily legislative" in its functions.

Imagine the situation that might exist if a legislature could render advisory opinions respecting statutes previously enacted. Fear of favoritism and undue influence is one of the stated rationales for much of the challenged legislation. The ability of Congress to render advisory opinions, especially in an area such as electoral law, would open unprecedented vistas of favoritism. Because advisory opinions contemplate the application of statutory provisions to specific and concrete factual situations, they clearly fall outside the category of legislative decisions. The Court of Appeals erred in holding that the FEC's advisory-opinion power was legislative.

In support of its contention that the FEC may be appointed by Congress, the Court of Appeals compares some of the FEC's functions to the Comptroller General's certification and audit functions. But, as Judge MacKinnon points out in dissent, the Comptroller General is appointed by the President, 31 U.S.C. § 42, op. at 1615. The Comptroller General, like the FEC, performs functions which are partly legislative and partly executive, *United States* v. *Stewart*, 234 F. Supp. 94, 99 (D.D.C.), *aff'd*, 339 F2d 753 (D.C. Cir. 1964).

The FEC's other powers are even more clearly executive or judicial. The civil-enforcement power, 2 U.S. C. §

[8] See United States v. M'Cabe, 129 F. 708, 711 (1st Cir. 1904).

437g, which includes receiving complaints, investigating violations, attempting to correct violations by conciliation and persuasion, and instituting civil-enforcement actions, is executive beyond question. To emphasize the importance of the civil-enforcement power, Section 437c(b) grants the FEC *primary* civil enforcement power over the FECA and certain enumerated sections of Title 18. And if the FEC requests, the Attorney General "shall" institute civil-enforcement actions and "shall" report to the FEC within 60 days as to the action he has taken. § 437g(a)(7), (b).

The legislative sponsors clearly envisaged a vigorous enforcer, not one that would abdicate its responsibilities at the first challenge. See remarks of Rep. Frenzel, a key supporter of the FEC, 120 *Cong. Rec.* H 10908 (daily ed. Nov. 20, 1974). Similarly, the FEC's powers "to formulate general policy," 2 U.S.C. § 437d(a)(9), and to make rules, *id.*, § 437d(a)(8), are quintessentially policy-making functions falling within the executive sphere.

Although in its brief filed in the Court of Appeals (FEC Brief at 55), the FEC attempted to disavow any rulemaking power with respect to Title 18, U.S.C., in its first action dealing with an actual election (the special New Hampshire Senate race) the FEC issued sweeping "interim guidelines" replete with rules referring to and interpreting sections of Title 18, FEC Notice 1975-34, 40 *Fed. Reg.* 40668-71 (Sept. 3, 1975). The rulemaking power has thus now been exercised, and its validity is plainly ripe for decision.

With respect to the operation of Subtitle H, the FEC has numerous powers, all of which are plainly executive. The FEC must certify the eligibility to receive payments of candidates during the nominating, national-convention, and general-election stages of the campaign, §§ 9005, 9008(g), 9036. The FEC must determine whether circumstances warrant repayments from candidates or parties

back to the Treasury, §§ 9007, 9008(h), 9038. The FEC is authorized to issue such regulations as it deems necessary to carry out its duties and functions under Subtitle H, §§ 9009, 9039. And finally, it has civil-enforcement power to implement the federal subsidy provisions, §§ 9011, 9040.

The sum effect of the FEC's battery of powers is that the FEC is the enforcer of the challenged statutes. Its record-keeping functions, 2 U.S.C. § 438 (deemed to be legislative by the court below, op. at 1616-17), are merely supportive of its enforcement powers. To hold to the contrary—that the enforcement provisions are merely adjuncts of the record-keeping duties—would, as the court below said in a different context (op. at 1582), be "Aesopian in the sense of the dog losing his bone going after its deceptively larger reflection in the water."

Especially in view of the vagueness of many of the statutory provisions and the great discretion vested in the FEC, the enforcement provisions, and particularly the advisory-opinion power, are plainly the FEC's primary function. As a practical matter, most questions arising under these statutes will be resolved, as they are being resolved today, by the exercise of the advisory-opinion power. Where that fails, the FEC has ample further powers to compel compliance with its wishes. To hold that powers of this sort, because joined with record-keeping functions, may be exercised by a congressionally appointed agency is to do drastic violence to the constitutional plan. Indeed, in the context of these statutes, even the record-keeping functions are not properly classified as legislative, because their primary purpose is not to enable Congress to consider new legislation but to enable the FEC to collect the data and conduct the investigations on the basis of which the enforcement provisions are to be exercised.

(4) *Congressional Usurpation in the Electoral Area Is Particularly Unacceptable Given the Sensitive Issues and Conflicts of Interest Involved.*

The powers of Congress are quite precise: it creates offices, and officers of the United States assume their positions only after the Senate advises and consents to their appointment by the President. The appointment power, however, rests with the executive.

The FEC flagrantly violates these principles. By entrusting the appointment power to the majority and minority leaders of both Houses, as well as providing for confirmation by both Houses, Congress sought to create, not an independent Commission, but a Commission dependent on Congress and thus responsive to its will. Thus it is that Congress controls the majority of the appointments, the salaries, and appropriations and, through the legislative veto,[9] the manner in which much of the Act is administered by the FEC. 2 U.S.C. § 438.

[9] Under 2 U.S.C. § 438(c), rules relating to reporting and disclosure requirements promulgated by the FEC are subject to veto by one or both houses of Congress. The history of the veto parallels that of the appointment power. Thach, The Creation of the Presidency, 1776-1789, 35 *et seq.* (1969); Ginnane, "The Control of Federal Administration by Congressional Resolution and Committees," 66 Harv. L. Rev. 569, 576 *et seq.* (1953). Vesting veto power in Congress is just as unconstitutional as vesting appointment power there. Watson, "Congress Steps Out: A Look at Congressional Control of the Executive," 63 Cal. L. Rev. 983 (1975); Harris, Congressional Control of Administration 241 (1964); Jackson, "A Presidential Legal Opinion," 66 Harv. L. Rev. 1353 (1953). Congress' retention of the legislative veto is additionally unconstitutional because it is performed without the participation of the President, as the Constitution requires. See Statement of Antonin Scalia, Assistant Attorney General, Office of Legal Counsel, on Executive Agreements (S. 1251 and S. 632), before the Subcommittee on Separation of Powers, Committee on the Judiciary, U.S. Senate May 15, 1975, at 11-23. Yet a further unconstitutional feature is that Congress may not delegate legislative power to one of its Houses, as the veto provision does. The Federalist, No. 51 (Madison), Cooke ed. 1961, p. 350; Scalia, *id.* at 18.

It is naive to expect an agency subject to the control of a single branch to act independently of the will of those who control that branch. Indeed, as Watson, *supra*, at 1043, points out ". . . the denial to Congress of the power to name public officers [was] intended to prevent opportunities for self-serving acts." Opportunities for self-serving acts abound under the FECA, demonstrating yet again that it is an incumbent-protection statute. The FEC was created by Congress, staffed by Congress, and draws its sustenance and direction from Congress. This is so even though it exercises numerous executive and judicial functions, *e.g.*, rendering advisory opinions, law enforcement, rulemaking, 2 U.S.C. §§ 437c(b), 437d(a) (6) and (9), 437g(a) (5) and (7), and similar functions with respect to Subtitle H, §§ 9005, 9007-09, 9011, 9036, 9039, and 9040. The Constitution forbids the creation of such an agency.[10] If the FEC is to exercise such functions, it must be appointed pursuant to Article II. Otherwise, it must be divested of those functions.

The answer of the Court of Appeals is to rely on cases upholding Congress' power under Article I, § 4, cl. 1 of the Constitution to regulate federal elections. But the power to regulate elections is no different from the other substantive powers of Congress (the power to tax, the power to regulate interstate commerce, etc.), and the court below makes no effort to distinguish it. Like all Congress' other substantive powers, the power to regulate elections is to be exercised "by Law," as Article I, § 4, cl. 1 expressly provides. Congress' function, with respect to elections as to other matters, is to legislate, not to administer. If what Congress has done here can be justified by its substantive power over federal elections, then Congress could equally vest in itself the appointment of all the independent regulatory agencies, and even agencies of the executive.

[10] *Cf.* United States v. Nixon, 418 U.S. 683, 693 (1974); Marshall v. Gordon, 243 U.S. 521, 536 (1917); Kilbourn v. Thompson, 103 U.S. 168, 190-91 (1881); Confiscation Cases, 740 U.S. 454, 457-9 (1869).

There is much language in the legislative history, appellees' briefs below, and the Court of Appeals' decision (op. at 1519) about the need for an "independent agency" to administer the challenged statutes. Appellants agree that whatever regulation Congress may constitutionally enact in the most sensitive area of electoral politics is best performed by an independent agency. But "independent" is exactly what this Commission is not; it is wholly subordinate to the legislative branch. A truly independent agency is, of course, created by the time-honored process: appointment by the President for fixed terms enacted by law, with confirmation by the Senate. Congress' unwillingness to use that process here is plainly a reflection of its desire that electoral regulation be conducted *not* independently, but under its own tight and continuous control.

As this Court stated in affirming the fundamental doctrine of separation of powers in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 176 (1803):

> "The powers of the legislature are defined and limited; and that those limits may not be mistaken or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these may, at any time, be passed by those intended to be restrained?"

The FEC is an instance where Congress has exceeded its constitutional powers. What it has done cannot be sustained by the judiciary, which, at least since *Marbury* v. *Madison*, has been committed to "maintaining the constitutional plan of separation of powers." *Glidden Co.* v. *Zdanok*, 370 U.S. 530, 536 (1962) (opinion of Justice Harlan); *Massachusetts* v. *Mellon*, 262 U.S. 447, 488 (1923).

B. *The Challenged Legislation Is Too Vague and Leaves Excessive Discretion to the Administering Authority.*

The challenged legislation renders criminal an enormous variety of political acts, 2 U.S.C. § 441, 18 U.S.C. § 608(i), I.R.C. §§ 9012, 9042. It is, however, a morass of uncertainty as to which activities are permitted and which lead to a federal prison. The sponsors of the legislation made no effort to deny this, but rather sought to avoid the problem by delegating power to the FEC. The court below took the same view (op. at 1581). The criminal provisions of the FECA Amendments, in particular, do not convey "sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *Jordon* v. *DeGeorge*, 341 U.S. 223, 231-32 (1951).

For example, an incumbent Senator running for reelection—not yet nominated, but unopposed in the primary—authorizes an expensive, in-depth poll of his constituents' views on public issues. Is that an expenditure under 18 U.S.C. § 608(c)? If so, is it to be allocated to the "campaign" for nomination or to the general election? The answers to these questions may determine whether the candidate spends six years in the New Senate Office Building or one year in Lewisburg. The legislation, however, contains not a glimmer of guidance to the most scrupulous candidate.

For those not authorized to seek advisory opinions (anyone who neither holds federal office nor is a candidate or a political committee, 2 U.S.C. § 437(f)), the legislation is plainly so vague as to give no adequate guidance. Political activities must either be avoided or undertaken at the risk that prosecutors or courts will decide after the event that a crime has been committed. For those entitled to seek an advisory opinion, the situation is little different. The legislation is so vague that persons acting in full good faith may well think that no reasonable person would believe that a

particular act was unlawful, *e.g.*, a poll as an expense of the contest for nomination, yet learn only too late that others disagree. There is, in short, insufficient notice even as to the circumstances in which an advisory opinion should be sought.

If the presence of the FEC is thought to cure the vagueness problem, that presence merely renders the statute unconstitutional in another way. In *Speiser* v. *Randall*, 357 U.S. 513 (1958), this Court held that tax-assessment procedures which shift the burden of proof to the taxpayers are not adequate where First Amendment issues are at stake. The Court said there that "the operation and effect of the method by which speech is sought to be restrained must be subjected to close analysis and critical judgment in the light of the particular circumstances to which it is applied." *Id.* at 520. And this Court has held unconstitutional in a long and important line of cases the delegation of excessive discretion to administering officers. See, *e.g.*, *Saia* v. *New York*, 334 U.S. 558 (1948); *Shuttlesworth* v. *Birmingham*, 394 U.S. 197 (1969).

This Court has repeatedly emphasized that "standards of permissible statutory vagueness are strict in the area of free expression . . . . Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP* v. *Button*, 371 U.S. 415, 432-33 (1963). If citizens are not clearly informed of what is unlawful, they will necessarily "steer far wider of the unlawful zone," *Speiser* v. *Randall*, *supra*, at 526. Indeed, this Court's characterization of the statute struck down in *Keyishian* v. *Board of Regents*, 385 U.S. 589, 604 (1967), accurately applies here: "Vagueness of wording is aggravated by prolixity and profusion of statutes, regulations, and administrative machinery, and by manifold cross-references to interrelated enactments and rules."

When both criminal penalties and First Amendment rights are involved, loose methods of enforcement tolerable elsewhere are plainly insufficient. Impartial, well-monitored and fair procedures must be provided, and the enforcing tribunal must be guided by legislation which provides adequate direction.

The FEC's power to make rules and general policy and to issue advisory opinions constitutes a system of prior restraint. *Bantam Books, Inc.*, v. *Sullivan*, 372 U.S. 58 (1963). Any system of prior restraint "comes to this Court bearing a heavy presumption against its constitutionality." *Id.* at 70. Such a system "avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system." *Freedman* v. *Maryland*, 380 U.S. 51, 58 (1965). The statute here fails to meet these standards in several respects. It empowers the Commission to issue regulations, rulings and advisory opinions that impose a system of prior restraint on political activity and speech without any judicial determination, *id.* at 58. Moreover, the statute fails to meet those procedural requirements that this Court has repeatedly identified: "*first*, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor; *second*, any restraint prior to judicial review can be imposed only for a specified brief period and only for the purpose of preserving the status quo; *third*, a prompt final judicial determination must be assured." *Southeastern Promotions, Ltd.*, v. *Conrad*, 43 L. Ed. 2d 448, 460 (1975).

The legislation under attack is a mountain of unanswered questions as to what is legal and what is illegal.[11]

[11] For example, Rep. Frenzel candidly described the statutory definition of "contribution" as "rather vague and nebulous." He hoped that the FEC would clarify the definition "on a case-by-case basis" by means of advisory opinions. 120 *Cong. Rec.* H 10910 (daily ed. Nov. 20, 1974).

(continued)

Indeed, the very authorization of advisory-opinion and rulemaking power demonstrates that Congress deliberately

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[11] (continued)

The following lengthy but by no means complete summary suggests how many important sections of the challenged statutes are impermissibly vague:

(1) The definitions of "candidate," 2 U.S.C. § 431(b); 18 U.S.C. § 591(b); I.R.C. §§ 9002(2), 9032(2). Obviously, since so much of the law turns on who is and who is not a candidate, this definition should be precise. Yet, note particularly 2 U.S.C. § 431(b) (2) and 18 U.S.C. § 591(b) (2): do these subsections embrace a preliminary poll to "test the waters" for a possible candidacy? If so, is it to be allocated to the candidate's primary or general-election expenditure limit? Does "candidacy" include trips around the state or district to talk to political leaders to see if sufficient support exists to begin a campaign? Does it include similar trips to talk with citizens to determine what issues are of major concern to them?

(2) The definitions of "political committee," 2 U.S.C. § 431(d); 18 U.S.C. § 591(d); I.R.C. §§ 9002(9), 9032(8). Does this include even an informal gathering of a few individuals who make the preliminary soundings and policy formulations described in the preceding paragraph? Does it, for instance, encompass a group analyzing a potential candidate's chances?

(3) The definitions of "contributions," 2 U.S.C. § 431(e); 18 U.S.C. § 591(e); I.R.C. § 9032(4), and "expenditure," 2 U.S.C. § 431 (f); 18 U.S.C. § 591(f); I.R.C. § 9032(9). The definition of "expenditure" appears to include all contributions. If it does, the consequences are enormous, since an individual then could not make both a contribution and an independent expenditure if the aggregate amount exceeded the expenditure limit. There is considerable additional lack of clarity in these sections. Are repaid loans to candidates to be considered campaign expenditures? When are the facilities of a newspaper, magazine, or broadcast station "controlled" by a political candidate? 2 U.S.C. § 431(f) (4) (A); 18 U.S.C. § 591(f) (4) (A). See also 2 U.S.C. § 434(e).

(4) Candidate expenditure limits. How are contributions and expenditures to be allocated with respect to primary and general elections under the limits imposed by 18 U.S.C. § 608?

(continued)

delegated vast discretion to the FEC. Annually, the FEC must decide hundreds or even thousands of cases which regulate political conduct and which bristle with First Amendment questions. Some questions may be general; others will be more particular. The answers to these ques-

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[11] (continued)

(5) Title 2 U.S.C. § 437a. The vagueness and other unconstitutional aspects of this section were sufficient for it to be declared unconstitutional by the court below.

(6) The powers of the FEC, 2 U.S.C. § 437d.

(7) The enforcement of the challenged statutes, 2 U.S.C. § 437g(5)-(7).

(8) The candidate-disqualification provision, 2 U.S.C. § 456.

(9) The provision on contribution "earmarking," 18 U.S.C. § 608(b) (6). The vagueness of this subsection is palpable, and the possibilities for discriminatory enforcement are immense.

(10) The provision for allocating expenditures by candidates for a presidential nomination for use in two or more States. *Id.*, § 608(c) (4). The necessity of determining the voting-age population "which can reasonably be expected to be influenced by such expenditures" is particularly egregious.

(11) Expenditures relative to a clearly identified candidate, *id.*, § 608(e), previously discussed at length, *supra*, pp. 107-15.

(12) The scheme for payments to candidates eligible for federal subsidies in general-election campaigns for the Presidency when insufficient funds are available, I.R.C. § 9006(d). This section vests enormous authority in the Secretary of the Treasury with almost no standards to guide his discretion.

(13) The exception from the limitations on expenditures by party national committees for their presidential nominating conventions. *Id.*, § 9008(d) (3). The same comments made in paragraph 12 apply here.

(14) The scheme for payments to candidates eligible for federal subsidies in campaigns for nomination by a party for the office of President. *Id.*, § 9037(b). The same comments made in paragraph 12 apply here.

tions will in every case decide the level of communication in which candidates and their supporters may engage.

In effect, Congress delegated to the FEC the power to make the delicate judgments between regulation and free political communication—the power frequently to decide who will win an election.

The breadth of the FEC's power and the virtually unchecked discretion it enjoys give it dramatic power over what kind of and how much speech particular candidates for federal office may engage in. Merely as a few of literally hundreds of possible examples of issues that have already come or will come before the FEC:

- Are private contributions eligible for matching government subsidies under Chapter 96 without regard to the costs incurred raising them, and without regard to whether any benefit is conferred on the contributor in exchange therefor? See FEC Notice 1975-40, 40 Fed. Reg. 41933 (Sept. 9, 1975).

- How should expenditures made by one candidate for federal office incurred while campaigning on behalf of a candidate for another federal office be allocated between those candidates? See FEC Opinion of Counsel letter 1975-48.

- What is the applicable spending limit for a candidate running for two federal offices simultaneously? See FEC Notice 1975-44, 40 Fed. Reg. 42839 (Sept. 16, 1975).

- How are the costs of a public-opinion poll made by a candidate before the primary election, but testing issues applicable in both the primary and the general election, to be allocated?

- How are the costs of printing brochures advocating the election of several candidates for different federal offices to be allocated? What if such brochures also include candidates for state or local office?

- In presidential elections, how are costs to be allocated when expenditures are made that have an effect on more than one state?

- If, as appellees contend, repayments of loans do not count as expenditures, can the contributor who made the loan make another contribution after the loan is repaid if the total of the loan and contribution together exceed the statutory limit?

Quite apart from issues of statutory vagueness, see *supra*, pp. 211-16, the questions the FEC must decide—almost necessarily on an *ad hoc* basis—will affect election results, no matter what answers it ultimately provides.

The FEC can investigate any citizen who engages in any political activity. Many of the statutory provisions, *e.g.*, 18 U.S. C. § 608(e), create unprecedented vistas for discriminatory and partisan enforcement. See *supra*, p. 213 n. 11. Clearly not all volunteer or independent activity can be monitored. Picking and choosing is necessary, and unwitting violation inevitable. The discretion granted is so great and timing in politics so important that judicial review will in most cases simply not afford effective protection against mistakes which will deprive some citizens of their rights. Corrupt or overzealous commissioners can turn these enormous powers to improper uses which stagger the imagination. Politicians eager to punish their enemies will no longer look to the tax laws. They will look to the election "reform" law instead.

If it is unconstitutional for a municipality to require that anyone desiring to use a loudspeaker obtain per-

mission of the police chief, *Saia* v. *New York*, *supra*, it is surely *a fortiori* unconstitutional to delegate to the FEC vast discretion to regulate virtually all political communication by federal candidates and their supporters.[12] If political freedom is to be regulated like economic arrangements, the "hands off" strictures of the First Amendment will be lost completely.

Clearly, the enforcement mechanisms do not meet the exacting standards of the First Amendment. The model upon which the FEC was purportedly created is that of the "independent" administrative agencies, to which considerable economic regulating is delegated. These agencies perform policy-making functions and are more politically responsive than courts because their members' terms are fixed by statute.

The independent agencies are at the very moment the subject of intense criticism for being "captured" by the interests they were supposed to regulate. See Cutler and Johnson, *supra*, at 1397. The Senate recently passed a bill to establish an Agency for Consumer Advocacy (to act as an advocate for consumers before federal agencies), S. 200, 94th Cong., 1st Sess. (1975), the entire *raison d'etre* of which is that only producer interests are fully represented before the other agencies.

What role the independent agencies should play in the area of economic regulation is a matter left primarily to legislative judgment. Different standards apply, however,

[12] FEC Chairman Curtis has outlined the dangers: "If this Election Commission doesn't show wisdom and understanding it could go too far, or, even more practical, they could build upon this new federal agency and give it more, and more, and more power, which would be the great danger, I would think, but right now I don't believe it's actually a danger, and hopefully we have the judgment not to go this far." Transcript of "Martin Agronsky's Evening Edition," prepared by the FEC, at 16-17.

when political speech is the subject of regulation. See *supra*, pp. 41-42.

If independent agencies have not fulfilled the hopes placed in them, far less can be expected of the FEC. Here, the appointment power is given to some of the very interests supposed to be regulated, creating an agency necessarily responsive to those in power in Congress. Given the manner of the appointment, the shortness of term, reliance for appropriations, and the legislative veto, the FEC seems designed, not to be "captured" by the regulated, but to represent them from the very start.

Bipartisan election commissions in the states have a sad history of unfair enforcement of state election laws, see Comment, "Bipartisan Election Administration—New York City: Pruning the Electoral Thicket," 84 Yale L.J. 61 (1974). The court below expressly viewed the mode of appointment as being on a bipartisan (rather than a nonpartisan) basis (op. at 1519). The FEC is an even greater danger because of the vast powers it exercises in this most sensitive area.[13] In the long run, the regulations promulgated by the FEC will reflect a responsiveness to those who hold power, contrary to the exacting standards called for by the First Amendment. *Speiser* v. *Randall*, *supra*; see also *Tumey* v. *Ohio*, 273 U.S. 510 (1927).[14]

There may, indeed, be constitutional leeway for an independent agency to perform administrative tasks, such as determining what reporting and disclosure forms are

[13] As the ACLU has said, ". . . bi-partisanship in the makeup and operation will naturally tend to favor the interests of the two major parties and their nominees." ACLU Report at 24.

[14] Proposals now before Congress, moreover, seek to give the FEC vast power over communications between citizens and governmental officials and criminal enforcement powers as well. See, *e.g.*, S. 776, 94th Cong., 1st Sess. (1975).

proper and acting as a custodian for the reports of candidates and political committees. But the regulation of conduct falling within areas protected by the First Amendment calls for legislative exactitude so that those affected will have adequate notice of what the law permits and what it prohibits, and to guide those who must administer it. There is, therefore, no room for great administrative discretion or for an enforcement process controlled by the legislative branch itself.

Like the postal statute in *Lamont* v. *Postmaster General*, 381 U.S. 301 (1965), which "sets administrative officials astride the flow of mail to inspect it, appraise it, write the addressee about it, and await a response before dispatching the mail," *id.* at 306, here the Act sets administrative officials astride the flow of politics in America, inspecting the campaign of this candidate, appraising the expenditures of that, writing this candidate about his campaign activity and awaiting a response before allowing it to go forward. This Court must surely conclude, as it did in *Lamont*, that "[t]he regime of this Act is at war with the 'uninhibited, robust, and wide open' debate and discussion that are contemplated by the First Amendment." 381 U.S. at 307.

C. *Subtitle H Unconstitutionally Grants Too Much Discretion to the FEC and to Incumbent Administrations.*

Subtitle H's allocation of federal funding will necessarily affect the outcomes of presidential elections, and the provision or non-provision of money is an act seriously affecting First Amendment rights. The directions given those administering these statutes, therefore, must be precise and detailed.

Subtitle H provides no such standards. For example, the FEC is permitted to increase the limit on spending for national conventions with virtually no criteria other than its

judgment whether an effective convention can be held at the prescribed level of spending, I.R.C. § 9008(d) (3). The construction of the courts below (op. at 1580) does not eliminate this vagueness.

Subtitle H is similarly excessively vague in the amount of discretion that it vests in incumbent administrations to determine the allocation of federal funding, I.R.C. §§ 9006(c)-(d), 9008(b) (3), and 9037. These sections, not discussed by the courts below, permit the Secretary of the Treasury, in effect, to govern the allocation of funds among candidates eligible for primary financing by making decisions about the likely success of third parties in the general elections. The Secretary must make an "equitable" distribution among primary candidates of each party, taking into account the sequence in which they have applied, *id.*, § 9007(b). The Secretary in 1976 must thus allocate between the incumbent President whom he serves and the President's opponents in his own party. The Secretary must also allocate funds to candidates for nomination, in situations where there are widely varying numbers of candidates within the two major parties. The exercise of that power by an incumbent administration could determine the outcome of both the nominating process and the general election. Such a grant of discretion is not only a perverse sort of remedy to emerge from Watergate; it is also flatly unconstitutional. *Cox* v. *New Hampshire*, 312 U.S. 569 (1941); *Saia* v. *New York*, *supra*.

D. *The Candidate-Disqualification Provision Is Unconstitutional.*

The FEC has the power to disqualify individuals from becoming candidates for federal office if it finds that those individuals, while candidates, "failed to file a report required by Title III" of the FECA (relating to reporting and disclosure requirements). The period of disqualification extends from the date of the FEC finding until one year

after the expiration of the term of the federal office for which the individual was a candidate, 2 U.S.C. § 456.

The language of this section is extremely imprecise, and accordingly vests the FEC with enormous discretion. What does "failed to file a report required by Title III" mean? Does it mean that the FEC can find such a failure if the required report is one day late? If the report omits required information? If the report is not written in the proper form? Is there a requirement of scienter? These and many other questions are unanswered by the statute.

The Court of Appeals deemed this issue unripe, but none of the opinions below indicated any support for Section 456. Quite the contrary, the majority expressed serious doubts about its constitutionality (op. at 1576). The court below did not consider, however, that the *in terrorem* effect of the candidate-disqualification section is considerable. Candidates will necessarily spend more of their time worrying over the correctness of their required reports and less time campaigning. Volunteers who help compile the required data will face the realization that an error by them could disqualify their candidate from future candidacies. The constitutionality of Section 456 is ripe for adjudication, and it should be invalidated.

Section 456 does not purport to give the FEC power to remove a victorious candidate for federal office from that office, a power which would be in flat conflict with *Powell* v. *McCormack*, 395 U.S. 486 (1969). Even as written, however, the section still conflicts with the theory of *Powell*, as supporters of the legislation recognized. Remarks of Rep. Frenzel, 120 *Cong. Rec.* H 7193 (daily ed. July 25, 1974). The qualifications for office expressed in the Constitution, see, *e.g.*, Article I, §§ 2, 5, were held in *Powell* to limit Congress' ability to exclude persons from office. Disqualification from being a candidate has the same effect. See Rosenthal, "Campaign Financing," *supra*, at 394.

Although this Court has not recognized an explicit "right" to be a candidate, it recently stressed that "[t]he right of a party or an individual to a place on the ballot is entitled to protection and is intertwined with the rights of voters," *Lubin* v. *Panish*, 415 U.S. 709, 716 (1974); see also *Bullock* v. *Carter*, 405 U.S. 134 (1972); *Williams* v. *Rhodes*, 393 U.S. 123 (1968). Lower federal courts have afforded considerable protection to candidates, while recognizing that the government can impose requirements such as age, residence, and citizenship, *Shakman* v. *Democratic Org. of Cook County*, 435 F.2d 267 (7th Cir. 1970); *White* v. *Snear*, 313 F. Supp. 1100 (E.D. Pa. 1970); *Stapleton* v. *Clerk for City of Inkster*, 311 F. Supp. 1187 (E.D. Mich. 1970); *Zeilinga* v. *Nelson*, 4 Cal. 3d 716, 484 P.2d 578 (1971).

This Court need not decide the issue of a "right to candidacy," however, since Section 456 is unconstitutional not only as an abridgement of the separation of powers but also as a prior restraint on the content of peaceful political activity. *New York Times Co.* v. *United States; ACLU* v. *Jennings, supra.* It should be declared invalid now without waiting until some unfortunate candidate in the future is tarred by allegations based on it, only to receive almost certain constitutional vindication later.

CONCLUSION

For the foregoing reasons, this Court should declare that the challenged statutes enumerated in the questions presented for review, *supra*, p. 5, are unconstitutional and should permanently enjoin their enforcement.

Respectfully submitted,

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September 19, 1975

CERTIFICATE OF SERVICE

I hereby certify that I have this 19th day of September, 1975, pursuant to Rules 33(1) and 33(3) (b) of the Rules of this Court, served all parties required to be served by causing three copies of the Brief of the Appellants to be delivered by hand to the following persons:

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September 19, 1975

APPENDIX A

Note on the Use of Election Statistics in the Record

The record contains two basic sets of campaign-financing statistics: (1) statistics on expenditures in the 1972 Senate general-election campaigns compiled by Roland J. Cole for a Ph.D. dissertation at the Kennedy School of Government at Harvard University, *Campaign Spending in Senate Elections* (1975) (hereinafter "Cole figures"); (2) statistics compiled by the Common Cause monitoring group on 1972 and 1974 congressional elections and the 1972 presidential election (hereinafter "Common Cause figures").

The proper use of the statistics depends on a clear understanding of the different assumptions on which each set was made and the strengths and weaknesses of those assumptions.

For example, appellees have criticized the Cole figures because (1) loan repayments are treated as expenditures, (2) all expenditures are treated as general-election expenditures where the candidate was unopposed for the nominations, and (3) in all other cases general-election expenditures are estimated and segregated from primary expenditures.

(1) As to the loan-repayment issue, the FECA provides no clue as to whether such loan repayments are to be included in expenditure totals or not, and the FEC has not yet ruled on the issue. Moreover, the point is academic; the table in Cole, *supra*, at 398-99, which compares Cole's figures with the Common Cause figures, makes it possible quickly to discern which candidates' expenditures might be substantially inflated by the inclusion of loan repayments. Such repayments do not affect the conclusions reached in this brief. For example, the Cole figures are relied on by appellants to analyze the five 1972 Senate campaigns in

which challengers defeated incumbents. In only one such case—Haskell vs. Allott in Colorado—were loan repayments of a relevant size, and there only marginally relevant.

(2) Cole's treatment of all expenditures by candidates unopposed for nomination as general-election expenditures is consistent with both common sense and experience.

(3) Appellees make much of the fact that Cole estimated general-election spending on the basis of the available data. To be sure, that data does not distinguish between general-election and primary-election expenditures, and absolute accuracy is not obtainable. But the FECA itself requires the distinction, and some attempt at differentiating the two kinds of spending has to be made if statistics from prior elections are to be at all useful. Indeed, agreed findings explain the process by which Cole distinguished between general-election and primary expenses, based on the date each expenditure was made. Findings II A 2, pp. 4-7; B 2, pp. 186-88; App. II-266-69, 568-70.

To be sure, absolute accuracy is not attained and is not claimed. "It is possible to segregate expenditure figures for such elections with reasonable accuracy, but not with certainty," *id.* II, B 2(c), p. 187; App. II-569. That the distinction between primary and general-election spending is difficult to make on the basis of existing reports is a peculiar argument for appellees to make, since it is a distinction employed by the challenged legislation to be enforced by criminal sanctions. If the distinction can not be rationally made, 18 U.S.C. § 608 is unconstitutional on its face. Indeed, at this very moment, the FEC is issuing guidelines allocating spending to particular candidates and particular elections. See, *e.g.*, FEC Opinion of Counsel letter 1975-48.

The act does not permit candidates to aggregate primary and general-election money. Candidates are not allowed to spend primary money for activities after the primary. And if expenditures are to be allocated to a

primary rather than to a general election, some effort must be made, even in an unopposed primary, to make it seem that the spending is to influence the primary.

The Common Cause figures—upon which the Court of Appeals placed exclusive reliance (op. at 1540 n. 105)—are thus misleading in the opposite direction; they make no attempt whatsoever to distinguish between primary and general-election spending. They give only spending totals for both elections lumped together, regardless of whether either or both were serious contests, and measure these against the "combined overall expenditure limit," that is, the total of limits for both elections plus the fund-raising allowance. It is plainly wrong to compare aggregate spending in previous years with a statutory limit which permits spending only at certain inappropriate times. This technique creates the appearance that the spending limits are far higher relative to past spending then they really are, since the vast majority of candidates had a serious contest in at most one election. See *supra*, p. 90. At the very least, the statute severely regulates the timing of campaign expenditures and thereby their effect on elections. While reference to the "overall combined limit" seems to enhance candidates' ability to spend, it does so only by requiring them to make expenditures far ahead of the general election. Money spent in June will affect far fewer general-election votes than money spent in October.

In addition, in some cases the primary is the only important race and substantial general-election spending is superfluous. In 1972, challenger Elizabeth Holtzman defeated long-time incumbent Emmanuel Celler in the Democratic primary in New York's Sixteenth Congressional District. She easily defeated her Republican-general election opponent, receiving 65.6 percent of the vote to his 22.9 percent. The Republican reported spending no money at all for either primary or general election, whereas Rep. Holtzman's total was $104,318. Findings II, A 3, p. 19;

App. II-299. Clearly the bulk of her funds was spent to defeat Rep. Celler in a very close race, although the Common Cause figures misleadingly suggest that it was spread over two campaigns.

The Common Cause figures suffer from other difficulties. For example, even though loans are clearly contributions under the provisions of the FECA Amendments, the Common Cause figures do not include them as contributions, Findings II, A 2(e), p. 6; App. II-268. Loan statistics are available in the agreed findings. *Id.* II, C 7, pp. 249-54; App. II-665-75.

Expenditure figures for previous elections, moreover, are not fully comparable to expenditures under the FECA Amendments. For example, the Consumer Price Index rose 18 percent between 1972 and 1974. See Findings II, C 4, 5 pp. 223-48; App. II-618-64 (charts demonstrating the impact of inflation on 1972 races, moreover, include no amounts expended prior to April 7, 1972, the effective date of the 1971 Act. *Id.* II, A 2, p. 4; App. II-267.

The FECA Amendments also vastly increase the costs of campaigning and the need to make larger expenditures than in prior campaigns. First, the need for accounting and legal help is increased by the disclosure requirements and the complexity of the FECA Amendments. In 1972, for instance, the Percy and Tower campaigns used computers to produce contributor or expenditure reports—the cost of compliance with FECA disclosure requirements in Tower's case being at least $30,000, Findings II, B 13, p. 195; App. II-575. Compliance with the disclosure provisions costs the same no matter what the size of the contribution. Increased reliance on small contributions thus means increased costs.

In addition, the limitation on individual contributions to $1,000 increases the costs of raising money because small contributions cost proportionately more than large

contributions to raise, *id.* II, B 41, pp. 200-01; App. II-580; Cole dep. tr. 384-86. The raising of small contributions is very expensive and, when direct-mail techniques are used, runs on the average of about 40 percent, *id.* II, B 50, p. 203; App. II-582. The 20-percent allowance for fund raising in the Act, therefore, is wholly inadequate and can by no means be treated, as appellees treat it, as a genuine increase in the limits. Since the whole purpose of direct mail is to reach likely contributors—that is, persons already convinced of a candidate's merit—fund-raising mailings have only a marginal campaign spin-off in contacting uncommitted swing voters. The most valuable mailing list is one which contains only names of already committed people.

APPENDIX B

FEDERAL ELECTION COMMISSION
WASHINGTON, DC 20463

August 28, 1975

Mr. Ronald Cocome
Chairman
Committee for Constitutional
Presidency—McCarthy '76
1223 Connecticut Avenue, N.W.
Washington, D.C. 20016

Dear Mr. Cocome:

This is in response to your letter dated August 22, 1975 and to confirm the subsequent telephone conversation between Mr. Peter Roman, Chief of the Commission's Audit and Ivestigation Division, and Ms. Mary Monroe, your Committee Treasurer. As Mr. Roman arranged with your Committee, the Commission will begin an audit of your records on Tuesday, September 2, at 10:00 AM.

Title 2 of the United States Code requires the Commission to conduct audits of reports and statements filed under provisions of the Federal Election Campaign Act, as amended. The Act also assigns civil jurisdiction to the Commission of all apparent violations of the Act and Sections 608, 610, 611, 613, 615, 616, and 617 of Title 18 of the United States Code.

In addition, the Commission is specifically charged to correct any apparent violations ". . . by informal methods of conference conciliation and persuasion." As part of the Commission's continuing efforts to encourage voluntary compliance, the Commission has authorized the Audit and Investigation Division to audit all reports and records of Presidential candidates and their principal campaign com-

mittees. While part of this audit is, as your letter notes, designed as a "preliminary step towards certifying candidates eligible for matching Federal funds", it is designed to insure compliance with Federal election law and all of the interim guidelines issued by the Commission. In that regard, I note with regret that your letter makes reference to but one of our interim guidelines, out of the numerous guidelines issued to date dealing with both certification for matching payments and the disclosure and reporting requirements of Federal election law.

If you have any further questions or comments concerning the Commission's planned audit, I invite you to direct them to Mr. John G. Murphy, Jr., our General Counsel.

Sincerely,

/s/

Thomas B. Curtis
Chairman